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Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for Lingle and Lueck

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LIMITING SECTION 301 PREEMPTION: THREE CHEERS FOR THE TRILOGY, ONLY ONE FOR *LINGLE* AND *LUECK*

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I. INTRODUCTION

The three cases whose thirty year anniversary is marked by this symposium deserve our commemoration and praise. In the *Steelworkers Trilogy*[1] the Warren Court encouraged further a system of private ordering that already had flourished in the service of the goals of the federal labor regulation from which it had been nourished. Whether or not Dean Shulman was correct in the fifties to doubt the wisdom of judicial enforcement of arbitration agreements and awards,[2] I think the intervening years have demonstrated clearly the contributions of federal regulation of such enforcement to the peaceful resolution of labor disputes.[3] To be sure, these intervening years have also continued to demonstrate the reluctance of many judges to permit unions to curtail managerial authority through the use of the arbitration process.[4] However, without law

* Professor of Law, Boston University. I particularly wish to thank my colleague Daniel MacLeod for several provocative and enjoyable discussions on the topic of this essay. I also thank Bernard Meltzer and Samuel Estreicher for their helpful substantive and editorial comments.

1. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

2. *See* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955). *See also* Aaron, *On First Looking Into the Lincoln Mills Decision*, in ARBITRATION AND THE LAW, PROCEEDINGS OF THE 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, at 1 (BNA, 1959). For the contemporary opposing view, see Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 605-606 (1954).

3. As stated by Professor Feller:

> [I]t turned out, of course, that the federal judicial intervention for which *Lincoln Mills* provided the premise was a protective one. The state courts, which traditionally regarded arbitration as simply another method of adjudicating contractual controversies subject to resolution under the general law of contracts, were intervening; what the Supreme Court did was to use the federal jurisdiction to halt the inroads which the states had been making.

Feller, *The Coming End of Arbitration's Golden Age*, in ARBITRATION—1976, PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, at 97, 102 (BNA, 1976). *See also* C. Morris, *Twenty Years of Trilogy: A Celebration*, in DECISIONAL THINKING OF ARBITRATORS AND JUDGES, PROCEEDINGS OF THE 33RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 331 (BNA, 1980).

4. *See, e.g.*, S.D. Warren Co. v. Paperworkers Local 1069, 846 F.2d 827 (1st Cir. 1988); S.D. Warren Co. v. United Paperworkers' Int'l Union, 845 F.2d 3 (1st Cir. 1988), *cert. denied*, 488 U.S. 992-93 (1988); Hoteles Condado Beach v. Union De Tronquistas, 588 F. Supp. 679 (D.P.R. 1984), *aff'd*, 763 F.2d 34 (1st Cir. 1985); Clinchfield Coal Co. v. Dist. 28, United Mine Workers, 720 F.2d 1365 (4th Cir. 1983); Detroit Coil v. Int'l Ass'n of Machinists, 594 F.2d 575 (6th Cir. 1979); Elec-

like that articulated in the *Steelworkers Trilogy*, labor arbitration could have been much more affected by the combination of this reluctance and the inevitable difficulty judges have not being influenced by the merits of disputes on which they are likely to have strong views.[5] The *Trilogy* contributed significantly to fulfilling the promise of judicial enforcement of arbitral agreements and awards made by section 301 of the Labor Management Relations Act[6] and by *Lincoln Mills*.[7]

In the past thirty years, however, the industrial relations and employment law environment has of course been dramatically transformed. As union density has continued to decline throughout these three decades, the proportion of the American workforce that can reap any benefits from the protection of industrial arbitration under collective agreements has dwindled.[8] Concurrently both federal and state laws providing minimum rights and guarantees to most employees, whether or not unionized, have proliferated. In response, employers, relying in part on the praise given arbitration in the *Trilogy*,[9] have argued to the courts that collective bargaining and the arbitration process require the sacrifice or compromise of these minimum rights for unionized employees. For at least the second half of this period the Court therefore has had to address a very different issue from those resolved in the three 1960 *Steelworkers* cases: the extent to which federal and state minimum rights and guarantees should be accommodated to the system of collective bargaining and attendant arbitration that Congress had encouraged in the federal labor

tronics Corp. of America v. Electrical Workers Local 272, 492 F.2d 1255 (1st Cir. 1974); Torrington v. Metal Products Workers Local 1645, 362 F.2d 677 (2d Cir. 1966). *See generally* Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243 (1987); Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 270-77 (1980). For consideration of pre-*Trilogy* and thus less restrained expressions of the same strong judicial tendencies, see Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1512 (1959); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1 (1952).

5. I therefore find quixotic Professor Wellington's view that the arbitration system would be better served if enforcing courts were not required to apply a heavy presumption in favor of an arbitration award. *See* Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U. L. REV. 471 (1962), elaborated in H. WELLINGTON, LABOR AND THE LEGAL PROCESS, ch. 3 (Yale 1968).

For a review of the early impact of the *Trilogy* on judicial intrusion on the arbitration system, see Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831, esp. 858-60 (1966). *See also* Professor Morris' approving discussion of the work of most of the circuits a decade ago in *Twenty Years of Trilogy*, *supra* note 3, at 355-67.

6. 29 U.S.C. § 185 (1982).

7. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

8. The proportion of American workers represented by unions declined to just 16.4 percent of all wage and salary employees during 1989. *See* Daily Lab. Rep. (BNA) No. 27, at A-1 (Feb. 8, 1990) (figure from Department of Labor, Bureau of Labor Statistics).

9. *See, e.g.*, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-82 (1960).

laws. Should arbitration be protected from the judicial enforcement of these rights and guarantees for employees covered by collective bargaining agreements, as the *Trilogy* protects arbitration from judicial intrusion?

In the series of cases beginning in 1974 with its *Alexander v. Gardner-Denver* decision,[10] the Court seemed to take a long stride toward resolving this issue by holding that the findings of an arbitrator acting under the authority of a collective bargaining agreement should not compromise an employee's capacity to press independent federal statutory claims, even if these claims depend on some of the same issues resolved in arbitration.[11] In *Alexander* and its progeny the Court considered employee claims resting on statutes enacted by the same federal legislature that enacted the labor laws encouraging collective bargaining and arbitration. But the Court's analysis indicated that it perceived no tension between protecting the arbitration process and ensuring the grant of equal minimum employment rights to unionized workers. The *Alexander* Court, for instance, explained that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties . . . the arbitrator has authority to resolve only questions of contractual rights, and this remains true regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII."[12]

It therefore should not have been surprising that the Court, in the past several years, has also declined to hold that Congress's solicitude for the collective bargaining process requires the abrogation of state-created minimum employment rights for employees represented by unions. The Court has rejected dicta in a pre-*Trilogy* case, *Teamsters Union v. Oliver*,[13] that suggested that state law could not prevent parties to a collective agreement from establishing, at whatever level they chose, the rights and benefits granted to employees, "a subject matter as to which federal

10. 415 U.S. 36 (1974).

11. *Id.* (race discrimination claim under Title VII of 1964 Civil Rights Act); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) (minimum wage claim under the Fair Labor Standards Act); McDonald v. City of West Branch, 466 U.S. 284 (1984) (first amendment claim brought under section 1983); Atchison, Topeka and Santa Fe Ry. v. Buell, 480 U.S. 557 (1987) (personal injury action under Federal Employees Liability Act). *Cf.* Electrical Workers, IUE, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (Title VII statute of limitation not tolled during pendency of grievance arbitration).

12. 415 U.S. at 53-54. The Court did, however, allow that any "arbitral decision may be admitted as evidence and accorded such weight as the [Title VII] court deems appropriate", and "[w]here an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight." *Id.* at 60 & n.21.

13. 358 U.S. 283 (1959).

law directs them to bargain."[14] In *Metropolitan Life Insurance Co. v. Massachusetts*,[15] the Court held that a state could require employers with collective bargaining obligations to impose "minimal substantive requirements on contract terms negotiated between parties to labor agreements."[16] The Court stated that it could "see no reason to believe that . . . Congress intended state minimum labor standards to be treated differently from minimum federal standards."[17] More recently, in *Lingle v. Norge*,[18] the Court held that state court enforcement of a state law right against retaliatory discharge was not preempted by the federal labor laws for employees covered by collective agreements containing arbitration and unjust dismissal protection clauses, even though the state court adjudication might decide the same factual issues upon which arbitration for unjust dismissal under the collective agreement would turn.[19]

Lingle, however, surely does not protect state law to the extent that *Alexander* protects federal law. The *Lingle* Court, reaffirming its 1985 decision in *Allis-Chalmers Corp. v. Lueck*,[20] iterated that Congress intended that section 301 preempt a significant range of state law employment guarantees—those guarantees that cannot be implemented without an interpretation of a collective bargaining agreement.[21] *Lueck* had found preempted the application of a state tort for bad-faith handling of an insurance claim to an insurance plan secured in a collective bargaining agreement. The *Lingle* Court stressed that the *Lueck* Court had appropriately relied on the section 301 principle first pronounced in *Teamsters v. Lucas Flour Co.*,[22] that uniform federal law must govern the interpretation of collective bargaining agreements in state as well as federal courts.[23] The *Lueck* Court had found that the state claim turned on a finding of a breach of an obligation imposed by the collective agreement. The Court had concluded that under federal section 301 law such a finding could be made only by an arbitrator, in order to preserve "the central role of arbitration in our system of industrial self-government," as se-

14. *Id.* at 295.

15. 471 U.S. 724 (1985).

16. *Id.* at 754.

17. *Id.* at 755. *See also* Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987) (upholding Maine statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing); Malone v. White Motor Corp., 435 U.S. 497 (1978) (upholding pre-ERISA state act requiring minimum funding and vesting levels for employee pension plans).

18. 486 U.S. 399 (1988).

19. *Id.* at 406-10.

20. 471 U.S. 202 (1985).

21. 486 U.S. at 410-13.

22. 369 U.S. 95 (1962).

23. 486 U.S. at 405-06.

cured by the Trilogy.[24] The *Lueck* plaintiff's claim thus had to be dismissed "for failure to make use of the grievance procedure established in the collective-bargaining agreement."[25]

After *Lueck* the preemption of state law claims by employees covered by collective bargaining agreements seemed to spread.[26] *Lingle* partially stemmed the flow,[27] but the lower courts continue to deny significant state law rights to unionized employees in the name of section 301 and the arbitration process that it has encouraged.[28] Many of these lower court decisions paint a much too broad swath of section 301 preemption through the range of employment rights now being made available by state law.

The fault, I suggest, lies with the preemption test suggested in *Lueck* and expressly articulated in *Lingle*. Both cases were correctly decided on their facts, but neither adequately explained why either the need for uniform federal law governing the interpretation of collective agreements or protection of the arbitration process requires preemption of some state law claims. The result has been a section 301 preemption test that has confused and misled the lower courts.

I will also argue in this essay that the Court's difficulty with section 301 preemption in part derives from its failure to confront directly how the grant of certain minimum rights to unionized employees may conflict with federal labor policies supporting labor law preemption doctrine in addition to that applied through section 301. In particular, I wish to suggest that although the broad dicta of the *Oliver* case has been rightly rejected by the Court, *Oliver* does suggest a principle that should help define those state laws that might impair the free processes of collective bargaining that have been encouraged through the National Labor Relations Act.[29] I will contend that by widening its preemption focus the Court could have more convincingly decided not only *Lueck*, but even more clearly its 1990 *United Steelworkers of America v. Rawson* case,[30]

24. 471 U.S. at 219 (citing *Warrior & Gulf*, 363 U.S. at 581).

25. 471 U.S. at 221 (citing Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965)).

26. *See* Herman, *Wrongful Discharge Actions After Lueck* and *Metropolitan Life Insurance: The Erosion of Individual Rights and Collective Strength*?, 9 INDUS. REL. L.J. 596, 639-644 (1987).

27. *See, e.g.*, cases cited at notes 92 and 93 *infra*.

28. *See, e.g.*, cases cited at note 94 *infra*.

29. This form of preemption is now referred to as "*Machinists* preemption" by the Court—*see, e.g., Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 749-51 (1985)—because of the decision in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which held that a state's penalization of certain conduct that is neither prohibited or protected by the Labor Act, may still be inconsistent with the Act because it upsets "the balance of power between labor and management" anticipated by Congress. *Id.* at 146 (quoting *Teamsters v. Morton*, 377 U.S. 252, 260 (1964)).

30. 110 S. Ct. 1904 (1990).

involving a state tort claim against a union for negligently performing mine safety inspections. Widening its focus would also allow the Court to articulate doctrine that would more effectively control lower court frustration of organized employees' invocations of state law rights that do not significantly impede the collective bargaining process.

Before making these arguments, however, I want to return to a brief review of the *Trilogy*. Doing so seems appropriate not only because of the anniversary marked by this symposium, but also because the content and justifications for the section 301 law fashioned in these three cases provides an illuminating background for understanding how the Court should be fashioning section 301 preemption law.

II. THE WISDOM OF THE TRILOGY

It is important to recall exactly why the presumptions in favor of arbitration established by the *Trilogy* are appropriate and of what they consist. The historical setting should first be noted. By 1960 industrial arbitration was of course well developed and almost ubiquitous in unionized shops.[31] It had become one of the crowning achievements of the American labor movement: an effective means by which unions could secure the enforcement of the restrictions on managerial discretion for which they had fought so hard in rounds of collective bargaining over the prior two or three decades. Arbitration certainly offered clear advantages to unions over dependence on direct judicial enforcement. It was of course cheaper and quicker than litigation, but more importantly, it provided privately chosen decisionmakers to replace a judiciary that most union leaders had good reason to fear and distrust. Furthermore, it seemed both generally acceptable to management, and consistent with the national labor policy, because it served as an effective alternative to industrial conflict in general and strikes over the interpretation and enforcement of collective agreements in particular. The decision of the Court in *Lincoln Mills* to interpret section 301 to permit federal court enforcement of agreements to arbitrate thus had seemed to promise unions a constructive use of the judicial injunctive power that had so often been used against them in the past.[32]

The *Steelworkers Trilogy* helped secure that promise by using section 301 lawmaking authority to articulate a series of presumptions about

31. *See* L. KELLER, THE MANAGEMENT FUNCTION: A POSITIVE APPROACH TO LABOR RELATIONS 256 (BNA 1963); 2 B.N.A. Collective Bargaining Negotiations & Cont. Serv. No. 51.6 (Aug. 26, 1965).

32. *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930); Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989).

the meaning of arbitration clauses secured by unions in collective agreements. In *American Manufacturing* the Court held that agreements to arbitrate disputes concerning the application of a collective bargaining agreement should be presumed to include even those claims that a court deems to be frivolous.[33] In *Warrior & Gulf* the Court held that such agreements to arbitrate should also be presumed to cover any claim that a collective bargaining agreement has been breached unless the agreement expressly excludes that claim from the reach of the arbitration clause—unless "the most forceful evidence of a purpose to exclude the claim from arbitration" can be presented.[34] Finally, in *Enterprise Wheel* the Court held that agreements to arbitrate should be presumed to anticipate judicial enforcement of any arbitration award that is based on an arbitrator's construction of a collective agreement.[35]

It is critical to understanding both the meaning and wisdom of the *Trilogy* to note that each of these holdings only establishes presumptions about the meaning of arbitration clauses in collective bargaining agreements. Each of these presumptions is fully rebuttable by clear language that expresses the desire of a contracting union and employer to further curtail the authority of the arbitrator.[36] This may be most obvious for the presumption in favor of substantive arbitrability pronounced in *Warrior & Gulf*; the Court there directly stated that courts should not force parties to arbitrate matters that they had expressly excluded from the scope of arbitration.[37] But it also must be true for the presumptions

33. 363 U.S. at 568.

34. 363 U.S. at 584-85. *Warrior & Gulf* of course also held that it was for the courts to determine the scope of the arbitration obligation by application of this presumption. *Id.* at 582-83.

35. 363 U.S. at 598.

36. Professor Wellington's claim that the *Trilogy* "undercut the freedom of contract goal of the Labor-Management Relations Act" therefore seems off the mark. *See* WELLINGTON, LABOR AND THE LEGAL PROCESS, *supra* note 5, at 112. Judge Hays, by contrast, was correct about this much concerning the meaning of the *Trilogy*.

> In other words, as a practical matter, arbitration and the collective agreement are what Mr. Justice Douglas says they are if, and only if, the labor unions want them to be that way . . . *and* they can at the same time induce, or force, the employer to agree. As long as collective bargaining remains free, all the labor relations experts, the law professors, the arbitrators, and the Supreme Court Justices will not be able to change that.

Hays, *The Supreme Court and Labor Law October Term*, 1959, 60 COLUM. L. REV. 901, 924 (1960).

Professor Feller's vision of the labor arbitration system and the collective bargaining agreement on which it rests, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973), may be both normatively and descriptively compelling. However, Professor St. Antoine is certainly correct to suggest that whatever one thinks of this vision, or any rival vision, neither academics, arbitrators or even courts have authority to impose it on particular parties negotiating a particular agreement. *See* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look At Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1139-40 (1977).

37. The specific question in *Warrior & Gulf* was whether the employer's decision to contract out some bargaining unit work was subject to arbitration. The Court held that it was, because the agreement did not expressly exclude contracting out decisions from the scope of the arbitration

against judicial involvement in pre-arbitral (*American Manufacturing*) or post-arbitral (*Enterprise Wheel*) review of the merits of a claim of a breach of a collective agreement. Nothing in either decision suggests that parties to collective agreements could not provide for a system of judicial screening or review of the merits of arbitration claims or awards. In each of these decisions, as in *Warrior & Gulf*, the Court is exercising the only power that it is granted by section 301—the power to develop federal law to enforce private contracts between an employer and a labor organization. Nothing in section 301, or in the federal common-law making power inferred from this section in *Lincoln Mills* and its progeny, authorizes the Court to demand that employers and unions contract for any particular procedures.[38] The *Triology*, like other section 301 cases decided by the Court, are efforts to explain what unions and employers might agree upon and how; they do not in any way dictate what collective bargaining agreements must include.[39] As explained by Justice Brennan in his concurring opinion for *American Manufacturing* and *Warrior & Gulf*, "the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement."[40]

The *Steelworkers Trilogy* is thus significant not because it requires

process. However, the Court allowed that a "specific collective bargaining agreement may exclude contracting out from the grievance procedure. Or a written collateral agreement may make clear that contracting out was not a matter for arbitration." 363 U.S. at 584.

38. The unadorned language of section 301(a) should be remembered:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The *Lincoln Mills* Court teased this language to find "that it authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements . . . ." 353 U.S. 448, 451 (1957). It certainly did not, however, go so far as to find some implied authority to dictate the terms of collective agreements. Doing so would have been contrary to the encouragement of private ordering in collective agreements that is a central element of the federal labor policy. *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99, 108-09 (1970) ("While the parties' freedom of contract is not absolute under the [Labor] Act, allowing the [Labor] Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract . . . . it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands.").

39. As the Court has recently expressly reiterated, the *Warrior & Gulf* rule that the courts are to decide the scope of the agreement to arbitrate is also only a presumption, reversible by agreement of the parties. *See* AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986) ("*Unless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court not the arbitrator.") (emphasis supplied).

40. 363 U.S. at 570 (Brennan, J., concurring).

employers to accept a substantial level of arbitral authority, but rather because it enables unions to secure that authority through private agreement with minimal bargaining costs. The *Trilogy* makes clear that judicial authority can be restricted, even if it must not be. Equally important, the *Trilogy* minimizes the transaction costs of agreeing to such a restriction of judicial authority by providing that it is to be presumed from an agreement to submit disputes over the application of a collective agreement to arbitration. Absent the *Trilogy*'s presumptions, parties to collective bargaining would be uncertain what they would need to do to allocate particular authority to arbitrators. Case-by-case judicial probing of the intent of particular parties regarding arbitral authority would generate increased litigation as well as increased bargaining costs.

Of course the Court could have used its section 301 lawmaking power to fashion other presumptions, or mutable contract "default" rules,[41] that would have reduced uncertainty over the creation of arbitral authority, and thus potential bargaining and transaction costs. For instance, the Court could have held in *American Manufacturing* and *Enterprise Wheel*, that absent express language precluding judicial consideration of the merits of arbitral claims and awards, agreements to arbitrate should be presumed to anticipate judicial screening both of claims for frivolity before arbitration and also of awards for reasonableness after arbitration. Such presumptions might have been overridden without especially difficult bargaining as long as the Court was clear concerning the type of contractual language necessary to do so.[42] Furthermore, if bargaining costs are not significant, the direction of the presumption over the division of arbitral and judicial authority should make little difference as to how contracting parties decide to make that division.[43] If expansive arbitral authority is more valuable to a union than expansive judicial authority is to an employer, it should be traded for in negotiations, regardless of whether it is presumed to exist—at least as long as there is certainty about how the trade can be made and no special transaction costs.[44]

41. *See generally* Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

42. *Cf.* Ayres & Gertner, *supra* note 41, at 121-23 (criticizing Supreme Court real estate contract decision for failing to establish clearly how contractual presumption it pronounced could be circumvented).

43. The leading cite for this proposition is of course Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). However, for an excellent elaboration, stressing Coase's realization that high transaction costs occur in the normal, rather than exceptional case, see Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611 (1989).

44. Moreover, given that the underlying agreement to arbitrate is itself a creation of a negotiation between the parties, it can be argued that the direction of the presumption about the division of

Nevertheless, there is good reason to commend the particular presumptions established in the *Trilogy*. First, it is probable that the costs of bargaining are often sufficiently large to make a difference. Collective bargaining is a complicated, dynamic process that we cannot be confident of fully understanding.[45] It is certainly possible that in some cases the cost of bargaining around a presumption that does not accurately reflect the level of arbitral authority the parties would have chosen in the absence of bargaining costs would result in the acceptance of the suboptimal level of arbitral authority embodied in the presumption.[46] In those cases the presumption would frustrate the parties ability to achieve a contractual arrangement that is most satisfying to them. Contractual presumptions, like those expressed in the *Trilogy*, thus may not only reduce bargaining and litigation costs, they may also impose extra costs because of their potential rigidity. Such presumptions may be warranted only if they reflect what usually would be the intent of the parties in the absence of specific controlling language.[47] Yet I think that the three

arbitral and judicial authority should also have no distributional consequences. *See, e.g.*, Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241, 252-53 (1989) (contractual "gap-fillers" or presumptions theoretically have no distributive consequences for consensual bargaining). However, some empirical work suggests that contract presumptions in bilateral monopolies like those imposed by collective bargaining can have significant distributive effects, perhaps because they force parties wishing to reverse them to signal their importance. *See* Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. L. STUD. 237 (1988).

45. Consider again the description of the collective bargaining agreement in *Warrior & Gulf*, 363 U.S. at 580-81:

> The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable, some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." [Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1005 (1955).] Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators.

46. *See* Leslie, *supra* note 44, at 254-58 for one discussion of plausible transaction costs in collective bargaining.

47. Most commentators on presumptive or default rules erected by the law to govern various private economic relationships have argued that these rules should be fashioned to give parties what they would have wanted in the absence of bargaining costs. *See, e.g.*, Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 361 (1988); Baird & Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 835-36 (1985); Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983); Easterbrook & Fischel, *Corporate Control Transaction*, 91 YALE L.J. 698, 702 (1982). *But see* Ayres and Gertner, *supra*, note 41 (arguing that default rules should sometimes be chosen to force a party to disclose information).

Steelworkers decisions correctly divined the normal expectations of the parties to arbitration agreements in labor contracts.

This seems to me especially clear for the *American Manufacturing* and *Enterprise Wheel* presumptions against judicial screening and review of the merits of arbitration claims and awards. Arbitration had developed prior to *Lincoln Mills* and the *Trilogy* without such judicial involvement. It is hard to believe that many unions or employers sincerely interested in maintaining a viable arbitration process would have wanted to burden it with the expense and time of judicial screening and review. Certainly union leaders, frustrated by the historical general lack of sympathy in the judiciary to collective labor action and its fruits,[48] would have been unlikely to think that they had bargained for such restraints on the arbitral authority they had worked to secure. Justice Douglas was surely correct to assert for the *American Manufacturing* Court that the Steelworkers bargained only for the judgment of an arbitrator, not for that of a court.[49]

Moreover, hindsight provides even clearer vision on the presumptions established by this two thirds of the *Trilogy*. In the decades since the *Trilogy*, collective bargaining agreements rarely have included clauses purporting to grant courts authority either to screen grievances on the merits before ordering arbitration, or to review rendered arbitration awards on their merits.[50] As far as I can discern, there has been little litigation that reflects an attempt to contract around the *American Manufacturing* and *Enterprise Wheel* presumptions limiting judicial review of the merits of a grievance.[51] I doubt whether the costs of bargaining about these presumptions could be so high as to inhibit even such attempts if the presumptions did not reflect what is at least now the almost unanimous intent of the parties to arbitration agreements about the appropriate degree of judicial control over those agreements.

The presumption of an expansive scope of arbitration pronounced in the third case in the *Trilogy*, *Warrior & Gulf*, is of course frequently qual-

48. *See* WELLINGTON, *supra* note 5, LABOR AND THE LEGAL PROCESS, at 96-97.

49. 363 U.S. at 568-69. See also Professor St. Antoine's description of arbitrators as designated contract readers in St. Antoine, *supra* note 36, and Professor Feller's description of the arbitration system as an independent political jurisdiction in Feller, *The Coming End of Arbitration's Golden Age*, *supra* note 3.

50. Certainly the early dire predictions about the effect of the *Trilogy* on employer acceptance of arbitration, *see* Levitt, *The Supreme Court and Arbitration*, N.Y.U. FOURTEENTH ANNUAL CONFERENCE ON LABOR, 217, 237, have proved inaccurate.

51. There has of course been much litigation about the meaning of these limits, especially the limit on judicial review of a completed arbitration. *See, e.g.*, cases cited in note 4 *supra*. *See also* Int'l Union of Elec., Radio, and Machine Workers v. General Electric, 407 F.2d 253, *cert. denied*, 395 U.S. 904 (1969).

ified in collective agreements by the inclusion of clauses that expressly remove certain topics from the reach of arbitral authority. Moreover, as Justice Brennan stressed in his concurring opinion, *Warrior & Gulf* was also a more difficult case on its facts;[52] the arbitration agreement did expressly exclude "matters which are strictly a function of management," and the employer might well have hoped ex ante, at the time the agreement was negotiated, that subcontracting of work was encompassed by this exception.[53]

Still I think the *Warrior & Gulf* Court fashioned the best possible doctrine by requiring the employer to specifically list those matters that might be covered by the agreement but that are not subject to arbitration. As the *Warrior & Gulf* Court recognized, allowing employers to argue that exemptions are implicit in bargaining history or in other dealings between the parties could lead to the judicial consideration of the merits of arbitral claims that most parties to collective agreements do not intend.[54] It could, moreover, lead to uncertain and attendant bargaining and litigation costs.[55] Since *Warrior & Gulf*, employers know what they must do to avoid arbitration on particular topics; what they must obtain in negotiations should be clear. I am not convinced that when obtaining an exemption from arbitration on a topic is more valuable to an employer than maintaining arbitral control is valuable to a union, employers have much difficulty purchasing the exemption in negotiations.[56]

By contrast, a presumption of a narrower scope of arbitration might not be so easy to contract around. A presumption that nothing is covered by arbitration that is not specifically mentioned in the arbitration clause would carry the risk that the parties would neglect to specify some obligation implicit in the agreement that would not therefore be subject to arbitral resolution. As the *Warrior & Gulf* example of contracting out bargaining unit work illustrates, this could result in rendering arbitration ineffective against the erosion of the entire basis of the agreement.[57] I

52. 363 U.S. at 572 (Brennan, J., concurring).

53. It was thus the *Warrior & Gulf* presumption about the broad scope of arbitral authority that provoked the most criticism of the *Trilogy*. *See, e.g.*, Levitt, *supra* note 50, at 230.

54. 363 U.S. at 585.

55. *Cf.* Ayres & Gertner, *supra* note 41, at 117 (noting the major costs of tailoring a default rule to what the court thinks the individual parties would have wanted, rather than to what most parties would want).

56. There admittedly might be cases where an employer's request for exclusion of an issue from arbitration would upset delicate negotiations on other issues, even when the exclusion is more valuable to the employer than arbitral control would be to the union. Pareto optimality is not always easily reached in multi-issue negotiations. However, as a bargaining relationship matures and continues through a number of negotiation rounds, most "imperfections" should be able to be eliminated.

57. 363 U.S. at 572 (Brennan, J., concurring).

think this risk is much greater than the risk that parties neglect to mention some matter that they do not want subject to arbitration under the actual *Warrior & Gulf* rule. Employers of course are more likely to have knowledge about some future controversial exercise of managerial power, such as subcontracting, than are unions. A presumption against arbitrability thus would enable employers to more frequently benefit by the "strategic" behavior of purposefully avoiding express resolution of a possible matter of controversy than unions are able to benefit by analogous behavior under the *Warrior & Gulf* presumption. Forcing employers to specify potential matters of controversy by requesting an exemption from a general presumption of arbitrability is therefore more likely to lead to efficient bargaining.[58]

There is another important consideration that supports both the presumption in favor of arbitration expressed in *Warrior & Gulf*, and also the presumptions in favor of arbitral authority, expressed in the other two Steelworkers cases. The risk that bargaining rigidities will subject parties to a collective agreement to more arbitral authority than they might have chosen free of presumptions is less significant in light of federal labor policy than the risk that parties will be able to invoke less arbitral authority than they thought they had secured. As stressed above,[59] federal labor policy cannot impose a form of dispute resolution on unions and employers through section 301 law. Since section 301 law concerns contract interpretation, the intent of contracting parties must trump any interpretive presumptions expressed by that law. But the *Steelworkers Trilogy* illustrates how federal labor policy nonetheless supplies the content of the interpretive presumptions.

As Justice Douglas explained for the *Warrior & Gulf* Court: "The present federal policy is to promote industrial stabilization through the collective bargaining agreement . . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."[60] Arbitration contributes to indus-

58. As Bernard Meltzer pointed out to me, there may be cases in which a union that has formulated a future grievance strategy at the time of negotiations, knows better than an employer which exercises of managerial power will be at issue in future arbitration controversies. Even in such instances, however, employers are not ignorant of their own future potentially controversial uses of power.

The argument that default rules should sometimes be chosen to discourage the "strategic" and inefficient nondisclosure of information by one type of party to private agreements is developed in Ayres and Gertner, *supra* note 41, at 97-107. *See also* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 805-06 (1941) (contract rules may be justified by their function of forcing parties to focus on certain topics).

59. *See supra* note 38 and accompanying text.

60. 363 U.S. at 578.

trial peace and thus to the goals of the national labor policy because it is the substitute for strikes and other labor unrest, not for other forms of adjudication in court.[61] Justice Douglas may have incorrectly assumed that if a dispute is not subject to arbitration, it also will always not be subject to any contractual obligation not to strike.[62] But he surely must also have understood that employees denied a forum for their contractual claim are much more likely to resort to strikes or other economic action, whether or not this action is prohibited by their collective agreement.

The federal labor policy similarly supports the *American Manufacturing* and *Enterprise Wheel* presumptions. The fully plausible assumption can be made that employees frustrated either by judicial denial of their access to an arbitral forum or by judicial refusal to enforce the success that they achieved at such a forum are much more likely to resort to aggressive economic action. Adjudication before neutral tribunals chosen in part by the employees' representatives offers an opportunity to ventilate and defuse disputes, as long as the legitimacy of this adjudicatory process is accepted and maintained by the courts. Judicial rejection of the outcome of the process on the other hand is likely to lead to further frustration and polarization at the workplace.

This use of section 301 presumptive rules to channel the parties toward arbitration might be supported by either paternalistic or externality concerns. Our national labor policy may view arbitration as a more critical alternative to work stoppages than do many parties at the time of contract negotiations, either because the parties cannot anticipate their own long run interests, or because work stoppages have effects on third parties not accounted for by contracting employers and unions. These concerns can be over weighed where the parties to a collective agreement are willing to incur the costs of bargaining around the presumptions of the *Trilogy*; but if the concerns are worth at least as much as the costs of such bargaining, they can alone justify the presumptions.[63]

The above analysis of the meaning and wisdom of the *Trilogy* teaches several lessons of relevance to understanding how the Court might best articulate section 301 preemption of state employment laws.

61. *Id. See also* Feller, *supra* note 3, at 100 ("That is the true meaning of the famous, and not quite accurate, statement in the *Warrior & Gulf* opinion that arbitration is the quid pro quo for the agreement not to strike. A more accurate phrasing would put it that arbitration is a substitute for the strike.").

62. *See* 363 U.S. at 578 n.3 (citing *Lincoln Mills* for the proposition that the arbitration alternative is the "quid pro quo" for an agreement not to strike).

63. *Cf.* Ayres and Gertner, *supra* note 41, at 125 (". . . if a certain type of contract generates a mild externality, we may want to discourage most [but not all] people from entering this type of contract.").

First, the Steelworkers cases all provide examples of the Court using its section 301 authority to interpret collective bargaining agreements to establish revocable presumptions about what parties to collective agreements intend. These cases may channel such parties toward greater arbitral authority, but they do not require it.[64] This model should apply to nearly all section 301 law, which is concerned only with the interpretation of a contractual agreement.[65] Even the *Lincoln Mills-Lucas Flour* rule directing that federal law govern the interpretation of collective agreements in both federal and state courts should be able to be circumvented by parties to particular collective agreements through clear contractual language stating the parties' intent that state law govern interpretations. Such language should effectively incorporate the state law as the section 301 federal law used by both federal and state courts.

Second, the particular presumptions established in these cases illustrate how uniform section 301 law can facilitate collective bargaining. One advantage of the law made by the *Trilogy* is simply that it is clear and consistent law that bargaining partners can easily understand will apply to their collective agreement unless it is expressly qualified in some manner. Third, the particular presumptions of the *Trilogy* probably facilitate the efficient bargaining that Congress presumably would have desired. This seems true because the presumptions either express the almost universal intent of parties to collective agreements (*American Manufacturing* and *Enterprise Wheel*) or because they place the burden of carving out exceptions on employers who are more likely to know what possible exceptions warrant special attention (*Warrior & Gulf*).

Fourth, the particular presumptions of the *Trilogy* can also be justified as an encouragement of the arbitral authority that seems to serve the federal labor laws' central goal of industrial peace. It is important to stress, however, that the presumptions may contribute to this goal by

64. This analysis answers those, like Professor Meltzer, *see* Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464, 476-77 (1961), and Wellington, *supra* note 5, who expressed concern that the *Trilogy* imposes more arbitral authority than that for which parties contract in collective bargaining. The Court in the *Trilogy* reads the national labor policy to value peaceful arbitration sufficiently highly to impose the costs of bargaining on those who wish to avoid it.

65. One exception is the rule announced in Vaca v. Sipes, 386 U.S. 171 (1967), permitting individual employees to sue employers for breaches of collective agreements when a union fails to discharge its duty of fair representation by refusing to process a grievance. This exception may be justified because of the inherent conflict of interest between union bargaining agents and employees concerning the effect of union breaches of representational duties. Exceptions are not required for rules that are not likely to be abrogated by unions in conflict with the interests of employees. *See, e.g.*, Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965) (". . . *unless the contract provides otherwise*, there can be no doubt that the employee must afford the union the opportunity to act on his behalf.") (emphasis supplied).

providing a legitimate alternative mechanism by which employees can secure the restrictions on managerial authority for which they have bargained. Court adjudication might also provide such an alternative, but it may not be as legitimate given the nature of judges and how they are selected, and it generally is not as fast or inexpensive.

III. SECTION 301 PREEMPTION UNDER *LINGLE* AND *LUECK*

A. One Cheer For Lingle

The *Lingle* decision[66] should be praised for rejecting one model of section 301 preemption, and criticized for positing another. The *Lingle* Court unanimously reversed a Seventh Circuit decision that had held preempted Jonna Lingle's claim that she had been discharged in retaliation for filing an Illinois workers' compensation claim.[67] The circuit court had recognized that the Illinois courts had both developed a state law cause of action for retaliatory discharge to protect the Illinois workers' compensation system,[68] and had extended that cause of action to all Illinois employees regardless of their alternative protection by a collective bargaining agreement.[69] Relying in part on its own precedents as well as some from other circuits,[70] the Seventh Circuit nonetheless held that Lingle's state law claim had to be treated as a claim for wrongful discharge under the collective agreement covering her employment. The court stressed the section 301-*Lucas Flour* principle that one uniform body of federal law must govern the interpretation of such agreements.[71] It reasoned that since "the just cause provision in the collective bargaining agreement may well prohibit such retaliatory discharge," the claim could have been brought under the collective agreement. The court further emphasized that an independent state law claim for retaliatory discharge "implicates the same analysis of the facts" as would a claim before an arbitrator under the just cause provision of the agreement.[72]

The Supreme Court expressly rejected these section 301 preemption

66. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988).

67. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987).

68. *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (1978) (discussed at 823 F.2d at 1035).

69. *See* Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985); Boyles v. Greater Peoria Mass Transit Dist., 113 Ill. 2d 545, 499 N.E.2d 435 (1986) (both discussed at 823 F.2d at 1036).

70. *See, e.g.*, Johnson v. Hussmann Corp., 805 F.2d 795 (8th Cir. 1986); Bale v. General Telephone Co. of California, 795 F.2d 775 (9th Cir. 1986); Mitchell v. Pepsi-Cola Bottlers Inc., 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985).

71. 823 F.2d at 1042-46.

72. *Id.* at 1046.

standards. The *Lingle* Court found irrelevant whether what the state law prohibits is also prohibited by a collective agreement and whether the state law cause of action requires analysis of the same set of facts that might be analyzed by an arbitrator resolving a dispute under the collective agreement.[73] The Court held that state law claims that can be resolved without interpretation of a collective agreement cannot be preempted by section 301.[74]

The Court's rejection of the Seventh Circuit's standards was clearly correct. As stressed in the above discussion of the *Trilogy*, section 301 does no more than establish the foundation for a system to interpret the meaning of collective bargaining agreements. Section 301 preemption derives from the pronouncement in *Lucas Flour* that this system requires that the same uniform body of law apply in state as well as federal courts. The discussion of the *Trilogy* indicated why Congress might have wanted such uniformity: it facilitates collective bargaining by providing the parties with greater certainty about what they are negotiating.[75] State law that provides additional meaning to something negotiated in a collective agreement might be preempted by federal section 301 law in order to maintain uniformity. However, state law like that of the Illinois law at issue in *Lingle*, which is applicable to employees regardless of whether they are covered by any kind of collective agreement, cannot possibly threaten the uniformity of section 301 interpretive principles or the clarified collective bargaining they promote. The Illinois retaliatory discharge tort on which Lingle relied does not force an employer or union negotiating a collective agreement for an Illinois bargaining unit to be concerned that something they include in the agreement will impose some additional duty on the employer or expose it to additional potential remedies. The duty and potential remedies created by this tort will confront Illinois employers whether or not they even negotiate an agreement.

Courts and commentators have argued that allowing state causes of

73. 486 U.S at 406-10.

74. *Id.* at 413.

75. As explained in *Lucas Flour*:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargaining agreement was made the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

Local 174, Teamsters v. Lucas Flour, 369 U.S. 95, 103-04 (1962).

action like that of Lingle's will cause fewer labor disputes to be resolved by the arbitration process. The Seventh Circuit in *Lingle*, for instance, asserted that the preemption of the Illinois retaliatory discharge tort was necessary to serve the federal policy of protecting the arbitration process from judicial encroachment,[76] a policy that I have just noted is at least a partial explanation of the Steelworkers' presumptions. The Seventh Circuit announced that Congress "envisioned" arbitration to be an "exclusive" process and suggested that use of arbitration to resolve labor disputes would decline to the extent unionized employees could obtain relief by pressing state claims against discharges.[77] The court also argued that allowing state law claims like that of Lingle's to proceed could make unions seem less necessary and thus could even inhibit the union organization on which the proliferation of the arbitration system promoted by section 301 law depends.[78]

But such arguments do not make a compelling case against the Supreme Court's reversal of the Seventh Circuit. First, none of these arguments has anything to do with the basis for section 301 preemption first established in *Lucas Flour*. Although the arguments appeal to a policy (the encouragement of arbitration) that has influenced the development of section 301 law, they do not concern the meaning of collective bargaining agreements and thus are not themselves relevant to the task of section 301—developing a uniform body of principles to interpret collective agreements. If Congress had wanted to preempt any state law claim based on a controversy that conceivably could be resolved through arbitration, Congress' purpose would not have been to insure that one body of law govern the interpretation of collective agreements.

Moreover, the possibility that Congress has had this intent is much too slim to justify the development of some new preemption principle based directly on achieving some preeminence for arbitration.[79] Given

76. 823 F.2d at 1046-47. *See also, e.g.*, Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance After Lingle v. Norge Division of Magic Chef, Inc.*, 41 HASTINGS L.J. 1149, 1170-73 (1990); White, *Section 301's Preemption Of State Law Claims: A Model For Analysis*, 41 ALA. L. REV. 377, 386-88 (1990); Wheeler & Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1, 30-31 (1986).

77. 823 F.2d at 1046.

78. *Id.* at 1047. *See also* Yonover, *Preemption of State Tort Remedies For Wrongful Discharge In The Aftermath Of Lingle v. Norge: Wholly Independent Or Inextricably Intertwined?*, 34 S.D.L. REV. 63, 96 (1989).

79. Such a principle also would fit with neither of the two other labor law preemption doctrines that have been established by the Court. First, the availability of private arbitration as an alternative remedy for individual employees does not mean that the state law they invoke threatens the primary jurisdiction of the National Labor Relations Board by protecting activity that is also arguably protected by the National Labor Relations Act. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Second, providing individual employees state law remedies for employer actions

the values of federalism and Congress' clear decision not to oust states completely from the regulation of the workplace, we should demand some clear indication that Congress anticipated such a broad preemption principle. No such indication can be found in statutory language or legislative history.[80] Congress' failure to exempt employees protected by collective agreements and arbitration clauses from its own federal minimum rights legislation[81] indeed suggests that Congress has been fully comfortable with having arbitration provide less than an exclusive remedy.

Congressional acquiescence in the *Steelworkers Trilogy* promotion of arbitration also provides no basis for protecting some exclusive domain for arbitration from state encroachment. As explained above, the *Trilogy* established only presumptions about the intent of parties to collective agreements; it did not require unions and employers to accept arbitration as an exclusive dispute resolution mechanism. Moreover, the *Trilogy* encouraged arbitration as an alternative to strikes and other weapons of industrial disruption, not as an alternative to orderly judicial adjudication of independent state law claims. The *Trilogy* protected arbitration from being thwarted or aborted by judicial determinations that arbitration claims had little merit. None of the three *Steelworkers'* cases had anything to do with preventing alternative judicial claims that do not obstruct the independent operation of the arbitration system.

Furthermore, there are critical flaws in all the claims that any federal policy to encourage arbitration will be impaired by the provision of alternative state law remedies for employer actions that might be challenged under arbitration clauses. The claim that such remedies must be preempted in order to avoid the discouragement of the successful union organizing efforts on which arbitration depends is most clearly flawed. It is plausible that the recent spread of state law remedies for wrongful discharge makes it more difficult for union organizers to convince some employees of the need to be represented by a union.[82] But any such effect

that also might be remedied through arbitration does not upset the balanced collective bargaining process for which Congress provided in the Labor Act. *See* Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) and *infra* notes 161-75 and accompanying text.

80. Section 203(d) of the Taft-Hartley Act, 29 U.S.C. § 173(d) (1970) is not an adequate basis for this principle. Section 203(d) only provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of *grievance disputes* arising over the application or interpretation of an existing collective-bargaining agreement." (emphasis supplied).

81. *See supra* notes 10-12 and accompanying text.

82. *See, e.g.*, Neumann & Rissman, *Where Have All the Union Members Gone?*, 2 J. LAB. ECON. 175 (1984) (contending that empirical data indicates union membership decline as a result of judicial exceptions to employment-at-will doctrine). *But see* Hauserman & Maranto, *The Union Substitution Hypothesis Revisited: Do Judicially Created Exceptions to the Termination-At-Will Doc-*

can only be aggravated—not mitigated—by law that announces to employees that selection of a union will result in the loss of these state law remedies.[83] Thus, a union discouragement hypothesis might provide support to the preemption of state law that denied employment protections to unionized employees, not a law that gave the same protections to union and nonunion employees alike.[84]

Any claim that state causes of action may inhibit arbitrators' independent resolution of factually parallel controversies also seems dubious. Given the relative speed of arbitration, any employee who is able to press concurrently a grievance to arbitration and a factually parallel state law claim is almost certain to have the arbitration decided first. Waiting to press the grievance to arbitration until a state court has ruled would generally not be feasible because of the limitations periods set out in collective agreements to govern arbitration.[85]

It is probably true that the availability of state law remedies for wrongful discharge will result in a somewhat reduced use of the arbitration remedy.[86] However, this should not be a concern for the federal labor law system. As just noted, section 301 law encourages arbitration as an effective and accepted alternative to work disruptions. Judicial enforcement of restrictions on managerial power secured in collective agreements is assumed to not provide such an alternative because unions and employees generally view it as too protracted, expensive, and per-

trine Hurt Unions?, 72 MARQ. L. REV. 317 (1989) (exposing flaws in the Neumann & Rissman study).

83. *See also* Herman, *supra* note 26, at 647-50 & n.263. It therefore is difficult to understand why a union lawyer would want the claims of the employees his clients represents to be preempted. *See* Gould, Hay, Rosenfeld, *When State And Federal Laws Collide: Preemption—Nightmare or Opportunity*, 9 INDUS. REL. L.J. 4, 24-27 (1987) (remarks of union lawyer Rosenfeld). Perhaps there is a concern that incumbent unions' ability to control and discipline represented employees is impaired by the availability of alternative state law remedies, access to which cannot be screened by the union. Control of employees through discriminatory access to the grievance system is not the kind of union control that the labor laws are to encourage, however, *see* Vaca v. Sipes, 386 U.S. 171 (1967) (arbitrary handling of grievance constitutes actionable breach of union's duty of fair representation); nor is it likely to lead to a healthy and growing labor movement.

One commentator, hoping to retain exclusive union control over discharge grievances of represented employees, but also recognizing that denying remedies to union workers could impair organizational efforts, has advocated that section 301 law be clarified to insure the permissibility of arbitrators granting punitive as well as compensatory damages. *See* Korn, *supra* note 76, at 1184-94. Such clarification, however, would not insure that employers would be willing to accept collective bargaining agreements that permitted such damages for wrongful discharge.

84. *See infra* notes 258-63 and accompanying text.

85. *See* BASIC PATTERNS IN UNION CONTRACTS 34 (BNA) (12th ed. 1989).

86. I would not deny that the hegemony of arbitration is challenged by independent state and federal employment laws. *See* Feller, *supra* note 3. Nonetheless, it would be wrong to assume that union employees would always prefer state law remedies to those of arbitration. For instance, there are reasons, such as ease of proof, expense, and arbitral use of the reinstatement remedy, why employees would sometimes prefer to arbitrate rather than litigate a retaliatory discharge claim such as that of Lingle's. *See* Herman, *supra* note 26, at 653-54; Yonover, *supra* note 78, at 92-93.

haps insufficiently neutral. However, there is no reason to believe that making available an alternative, elective judicial process will lead to frustration and industrial strife. Employees should not be frustrated by an alternative process that they can voluntarily choose to pursue in place of arbitration.

Employers of course would prefer that discharged employees covered by collective agreements not have the alternative of state law causes of action, just as they would prefer that employees not covered by such agreements not have such causes of action. However, as long as federal law permits states to grant minimum employment rights to all employees within their jurisdiction,[87] it is appropriate for the state to override these preferences in the service of acceptable social policies. If federal law is modified to restrict such state grants, it should restrict grants to union and nonunion employees equally.

It also seems unlikely that employers with organized work forces will respond to the grant of state causes of action for wrongful discharge by resisting the negotiation of clauses providing arbitral protection for discharge without just cause. The availability of a state law cause of action does not add to the marginal cost of arbitral protection.[88] Indeed, this availability may even reduce such costs. Most employers would hope that discharge disputes could be resolved through arbitration without the risk of high damages from a state court action. Given the costs and risks of state court litigation, this hope does not seem unrealistic; in many instances employees can be expected to choose arbitration rather than state court litigation.[89]

87. *See* Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985), discussed *supra*, notes 15-16 and accompanying text, and *infra*, notes 167-89 and accompanying text.

88. *See* Yonover, *supra* note 78, at 96 ("... a reasonable argument could be made that exposing an employer to two procedures, rather than one, for resolution of wrongful discharge claims may well discourage employees from entering into collective bargaining agreements and increase their anti-union sentiment.").

89. The Court made a similar point in explaining why providing an independent federal right of action against race discrimination in employment would not undermine the arbitral process:

> Moreover, the grievance-arbitration machinery of the collective bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974). *See also* Gould, *supra* note 83, at 10

Furthermore, a new principle of section 301 law could be established to clarify that employers could negotiate a clause that would condition a grievant's access to an arbitration system on the grievant's willingness to waive any state law challenge to the same employer action being grieved. The negotiability of such conditions should surely be a matter for federal section 301 law, rather than state law, since it concerns control of a benefit (arbitration) provided by collective agreements. The negotiability of such conditions would provide a further incentive for employers to accept arbitration because they would enable employers to use arbitration as an inducement to employees to waive state causes of action.[90]

In sum, the Supreme Court was surely correct to reject the Seventh Circuit's section 301 preemption doctrine, as well as to reverse the lower court's decision in the *Lingle* case. However, the Supreme Court fared no better in *Lingle* articulating its own preemption test. The test was simply stated by the Court: "we hold that an application of state law is preempted by section 301 . . . only if such application requires the interpretation of a collective bargaining agreement."[91] This test has restrained lower courts from preempting retaliatory discharge cases like *Lingle*,[92] as well as some other clearly independent state causes of actions such as ones based on discrimination laws.[93] It has not, however, ade-

(Professor Gould believes that after *Gardner-Denver* parties are more interested in arbitration of discrimination claims).

90. Given the supremacy of federal law, any state's claim that its cause of action should not be discouraged by such clauses would have to be overridden. *See also infra* notes 250-51 and accompanying text. The issue may be more complicated where the employee's independent cause of action is created by some federal statute, such as Title VII. However, voluntary and knowing waivers of mature Title VII causes of action by aggrieved employees in exchange for access to an arbitration system seem consistent with the *Alexander v. Gardner-Denver* decision. Clauses in collective agreements that condition access to an arbitration system on an individual's waiver of an external statutory right constitute union control of the arbitral process, not union waiver of the external right, as long as individual employees can freely choose the statutory rather than the arbitral remedy. *See also infra* note 251.

91. 486 U.S. at 413. The Court did qualify this statement in footnote by explaining that the relevance of the meaning of a collective agreement to a tangential issue in a state law action would not warrant the preemption of the entire action. *Id.* at 413 n.12. As an example the Court asserted that federal law might govern the interpretation of an agreement to determine "the damages to which a worker prevailing in a state law suit is entitled" without the underlying state law claim being preempted. *Id.* Although this example has provided some guidance for the lower courts, *see, e.g.*, Gulden v. Crown Zellerbach Corp., 890 F.2d 195 (9th Cir. 1989), the general principle expressed in the note was not sufficiently well defined to limit the preemption test set forth in the text of *Lingle*.

92. *See, e.g.*, Jones v. Roadway Express, Inc., 931 F.2d 1086 (5th Cir. 1991); Eldridge v. Felec Services, 920 F.2d 1434 (9th Cir. 1990); Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir.), *cert. denied*, 110 S. Ct. 539 (1989); Nelson v. Central Illinois Light Co., 878 F.2d 198 (7th Cir. 1989); Rintone v. Southern Bell Telephone & Telegraph Co., 865 F.2d 1220 (11th Cir. 1989); Bednarek v. United Food and Commercial Workers, Local 227, 780 S.W.2d 630 (Ky. Ct. App. 1989).

93. *See, e.g.*, Jackson v. Southern Calif. Gas Co., 881 F.2d 638, 644 (9th Cir. 1989) (race discrimination); Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir.), *cert. denied*, 110 S. Ct. 539

quately restrained lower courts from preempting many state law causes of action that do not threaten the uniformity of section 301 law for the facilitation of collective bargaining.[94]

A good illustration of the confusion not clarified by *Lingle* is *Jackson v. Liquid Carbonic Corp.*,[95] a First Circuit decision finding preempted a unionized employee's claim that his employer's seizure and testing of a urine sample violated both the Massachusetts Civil Rights Act[96] and the Massachusetts right-to-privacy statute.[97] Purporting to apply the *Lingle* section 301 preemption test, the First Circuit in a diversity action held that George Jackson's claims could not be established without interpreting the collective bargaining agreement that governed his employment, and that the claim thus must be pressed only through the grievance arbitration system provided by that agreement.[98] The court concluded that since the Massachusetts laws on which Jackson relied do not create an absolute right to be free of mandatory drug testing, the application of these laws to Jackson's case would be influenced by the meaning of the collective agreement. In a long and not particularly well structured opinion, the court asserted that the privacy rights created by these laws could be voluntarily waived,[99] that the laws would balance employer business interests against employee privacy interests under a standard of "reason-

(1989) (handicap discrimination); Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1286-87 (9th Cir. 1989) (age discrimination); Ackerman v. Western Elec. Co. Inc., 860 F.2d 1514, 1517 (9th Cir. 1988) (handicap discrimination). *But see* McCall v. Chesapeake & Ohio Ry Co., 844 F.2d 294 (6th Cir. 1988) (Railway Labor Act preempts handicap discrimination claim after *Lingle* because collective agreement must be interpreted to determine whether employee's handicap is related to job performance); Cuffe v. General Motors, 180 Mich. App. 394, 446 N.W.2d 903 (Mich. Ct. App. 1989) (handicap discrimination claim preempted because it asserted discriminatory denial of seniority rights defined by collective agreement).

94. *See, e.g.*, Clark v. Newport News Shipbuilding and Dry Dock Company, 937 F.2d 934 (4th Cir. 1991); Schlacter-Jones v. General Telephone of California, 936 F.2d 435 (9th Cir. 1991); McCormick v. AT & T Technologies, Inc., 934 F.2d 531 (4th Cir. 1991); Stikes v. Chevron USA Inc., 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991); Magerer v. John Sexton & Co., 912 F.2d 525 (1st Cir. 1990); Beard v. Carrollton R.R., 893 F.2d 117 (6th Cir. 1989); Edelman v. Western Airlines, Inc., 892 F.2d 839 (9th Cir. 1989); Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989); Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337 (8th Cir 1989); Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283 (9th Cir. 1989); Delapp v. Continental Can Co., 868 F.2d 1073 (9th Cir. 1989); Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988); Hanks v. General Motors Corp., 859 F.2d 67 (8th Cir. 1988); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142 (9th Cir. 1988); Utility Workers of Amer., Local 246 v. Southern Cal. Edison Co., 852 F.2d 1083 (9th Cir. 1988); Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988); Knafel v. Pepsi Cola Bottlers of Akron, Inc., 850 F.2d 1155 (6th Cir. 1988); Miller v. AT & T Network Systems, 850 F.2d 543 (9th Cir. 1988); Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988); Darden v. U.S. Steel Corp., 830 F.2d 1116 (11th Cir. 1987); Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987).

95. 863 F.2d 111 (1st Cir. 1988).

96. Mass. Gen. L. ch. 12, §§ 11H-11I (1986).

97. Mass. Gen. L. ch. 214, § 1B (1986).

98. 863 F.2d at 114-22.

99. *Id.* at 118.

ableness" that would turn on the meaning of the agreement,[100] that reasonable employee expectations of privacy could also be affected by the agreement,[101] that the agreement included a broad "management rights" clause that could limit Jackson's rights,[102] and that drug testing is a "mandatory subject of bargaining" under the federal labor laws.[103]

If the *Jackson* decision had held only that Jackson could not rely on the collective agreement to enhance the privacy rights created by Massachusetts law, it might have rested on the basis for section 301 preemption established in *Lucas Flour*. Permitting individual employees to use collective agreements to leverage their state law rights would subject negotiating employers and unions to the uncertainties that uniform section 301 law avoids. Employers and unions would have to be concerned that some clauses they were negotiating not only created the rule they envisioned, but also some additional employer obligation under some state law. The need to consider a variety of state laws, perhaps from multiple jurisdictions, would complicate the collective bargaining process in precisely the way that *Lucas Flour* was intended to avoid. The *Jackson* court therefore reasonably might have held that state law could not be used to interpret the collective agreement to enhance Jackson's privacy rights. Only section 301 federal law can be used to interpret a collective agreement to create rights.

But the *Jackson* decision not only prevented Jackson from using the collective agreement to enhance his privacy rights under Massachusetts law. It also held that because he was covered by a collective agreement, he could not make any claim under the Massachusetts privacy laws. Jackson thus was denied the opportunity that a Massachusetts employee not represented by a union would have to argue that his privacy was invaded without reference to any collective agreement. This additional aspect of the holding may well have been significant for Jackson. Nothing the court says about the meaning of the Massachusetts laws relied upon by Jackson means that a drug test could not violate these laws in the absence of a collective agreement. Even if the court was correct to conclude that Massachusetts law balances employer interests under a reasonableness standard rather than prohibiting all drug testing, this law surely does not protect only privacy rights defined in a collective agreement.

The *Jackson* court, however, did have support in the *Lingle* section

100. *Id.* at 115-19.
101. *Id.* at 119.
102. *Id.* at 120.
103. *Id.*

301 test for the complete preemption of Jackson's claims under Massachusetts law. The *Jackson* court seems to suggest that the collective agreement governing Jackson's employment may not only have enhanced his state law privacy claims, but also may have detracted from those claims by in effect compromising the privacy interests that he would have had absent the agreement. The court seems to assume that the management rights clause or some other provision in the agreement could have given the employer the authority to conduct drug tests that might otherwise be actionable under the Massachusetts laws.[104] The collective agreement thus could be relevant as a defense to any claim Jackson could make under Massachusetts law without reference to the agreement. Since interpretation of the agreement would be necessary to assess any such defense, the *Jackson* court could claim to be applying the *Lingle* preemption test.[105]

Yet note the effect of preempting state law claims of employees like Jackson merely because employers may defend against them by asserting that the employees' rights had been compromised or waived in a collec-

104. The court's apparent assumption that Jackson's union bargaining representative could waive his privacy rights under Massachusetts law in a collective agreement is curious. It is doubtful that Massachusetts would want an individual right like that to privacy to be negotiable by a collective bargaining agent, any more than Congress wanted the individual right to be free of status discrimination secured by Title VII to be negotiable by a union. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974). Indeed the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, §§ 11H-11L (1986), under which Jackson pressed one of his claims, grants Massachusetts employees the right to sue private entities for the denial of rights that the federal as well as state constitutions secure against the exercise of state power. The Court has never allowed constitutional rights to be compromised by collective bargaining agents. Such agents surely do not have control over employees' privacy rights in their physical autonomy as protected by the fourth amendment. The Court has indeed held that third parties may only provide consent to the search of those areas that are within their common authority. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974). *See also* Illinois v. Rodriguez, 110 S. Ct. 2793 (1990). The drug testing of Jackson may not have constituted an unreasonable search or seizure under the fourth amendment even if it had been conducted by the government, but if the testing would have been unconstitutional absent a collective agreement, it surely should have been notwithstanding the agreement.

The Ninth Circuit has also made the curious assumption that California would want any privacy rights implicated by drug testing to be waivable by a collective bargaining agent. *See* Schlacter-Jones v. General Telephone of California, 936 F.2d 435 (9th Cir. 1991); Utility Workers of America, Local 246 v. Southern Cal. Edison Co., 852 F.2d 1083, 1086 (9th Cir. 1988); Laws v. Calmat, 852 F.2d 430, 433 n.4 (9th Cir. 1988).

105. The Ninth Circuit has made the same claim in four decisions in which it rested preemption on the need to interpret a collective agreement to determine how collective bargaining may have redefined the privacy rights asserted by the plaintiffs. Schlacter-Jones v. General Telephone of California, 936 F.2d 435 (9th Cir. 1991); Stikes v. Chevron USA Inc., 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991); Utility Workers of Amer., Local 246 v. Southern Cal. Edison Co., 852 F.2d 1083, 1086 (9th Cir. 1988) ("Resolution of the issue whether Local 246 has bargained away its members' claimed constitutional rights must rest upon . . . the collective bargaining agreement . . . . "); Laws v. Calmat, 852 F.2d 430, 433 (9th Cir. 1988).

This interpretation of *Lingle* is also embraced in Brower, *Towards A Unified Accommodation of State Law and Collective Bargaining Agreements: Federalism, Public Rights and Liberty of Contract*, 26 HOUS. L. REV. 389, 435-36 (1989), and White, *supra* note 76, at 410-14.

tive agreement covering their employment. Even assuming that state law does permit such waiver, the effect is to deny these employees their state law rights on the mere possibility that they *may have been waived*, without ever even having the opportunity to obtain a resolution of whether they *actually were waived*. Jackson, for instance, probably could not have obtained resolution of whether his state law rights were compromised in the collective agreement covering his employment. Jackson could not press a claim under Massachusetts law to arbitration, and the collective agreement might not have required arbitral declaratory judgments on its meaning. Jackson might have gone before an arbitrator to claim the violation of any privacy rights secured by the collective agreement, but the resolution of such a claim would not necessarily resolve the question of whether his Massachusetts legal rights were compromised by the agreement. Jackson thus is denied causes of action that would be available to him were he not represented by a union, simply because his union *could* have waived his right to bring such actions, regardless of whether it actually did so.

This forced disparagement of the rights of unionized employees relative to those of nonunionized employees is not required to maintain a uniform federal law whose purpose is to facilitate the negotiation of collective agreements. The most that could be required by section 301 is that federal law establish for application in state as well as federal court, presumptions, analogous to those of the *Steelworkers Trilogy*, about whether some state law right has been waived. A state court, or a federal court with diversity jurisdiction, could apply such federal law when considering a state law cause of action like that in *Jackson*; the court would need only to dismiss the action if the federal law meant that the asserted state right had to be treated as waived.[106]

This approach would surely be sufficient to maintain the uniformity that the *Lucas Flour* Court sought in order to encourage collective bargaining. This uniformity results from applying general principles, like those established in the *Steelworkers Trilogy*, in state as well as federal courts, not from requiring all contract interpretation to be conducted by arbitrators. Recall that the rules announced in the *Trilogy* are for courts

106. The somewhat open-ended footnote 12 in the *Lingle* decision, 486 U.S. at 413 n.12, *see supra* note 91, may suggest that the Court anticipated this approach to treating cases like *Jackson*.

> Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state law analysis would not be thereby preempted.

Id.

to apply, not arbitrators. To require arbitrators rather than courts to determine whether a collective agreement has compromised a state law right is to confuse the reason that section 301 law must apply in state courts (uniformity facilitates collective bargaining) with one central consideration in the formulation of the content of that law (the encouragement of arbitration). Voluntary private arbitration is the preferred means of resolving claims under collective agreements because it promises industrial peace. Given the relative loose use of precedent by arbitrators[107] and the variant presumptions brought to bear by the arbitral community,[108] however, it is surely not the best way to achieve uniform interpretation of collective agreements. A claim based on state law for which a collective agreement may provide a defense arguably requires the application of uniform federal law, but it definitely does not require arbitration to secure industrial peace.[109]

In fact, even the argument for using federal law to determine whether a minimum guarantee granted by state law has been compromised or waived in a collective agreement is not compelling. Consider first the strength of a state's interest in applying its own law to determine whether a right that it has created has been compromised or waived. A state may be willing to permit the parties to collective bargaining to negotiate around a minimum employment right only if the state is assured that they have done so with conscious attention to the right. The state may on the one hand determine that the reasons for creation of the right are not sufficiently strong to outweigh the clear intent of a collective representative and employer to compromise the right, but on the other hand also determine that these reasons are sufficiently strong to require a clear intention to compromise. Again the analysis of the *Steelworkers Trilogy* is instructive.[110] State policymakers may prefer to have doubts about the parties' intent regarding a state-created right resolved so as to preserve rather than limit the right; the risk of missing the intent of contracting parties not to compromise may be more important than the risk of missing the intent of the parties to compromise. It seems that a state should be able to express the relative valuation that it gives minimum rights in

107. *See, e.g.*, Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 93, 102-103 (1989).

108. *See generally* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 3rd Ed. (BNA 1973), especially ch. 9.

109. Furthermore, had the *Jackson* court wanted to serve some general policy favoring arbitral interpretation of collective agreements, it could have conditioned its refusal to interpret the agreement on the employer's and union's willingness to obtain the interpretation of an arbitrator, rather than leaving Jackson with the uncertain prospect of obtaining an arbitral resolution of how his Massachusetts privacy rights were affected by the collective agreement. *See supra* notes 105-06 and accompanying text.

110. *See supra* notes 59-63 and accompanying text.

this way by formulating its own doctrine on when such rights can be compromised or waived. A greater includes the lesser argument seems applicable. If a state can completely insulate an employment right from waiver,[111] it should be able to protect it from the risk of unintentional waiver.

Furthermore, using state law doctrine to determine whether a state law minimum employment right should be treated as waived or compromised in a collective agreement does not threaten the uniform section 301 law important to the facilitation of collective bargaining. Using state law for this purpose would not require employers to review a variety of state laws carefully to insure that their collective agreements did not create new and unwanted duties and exposure to liability. The only duties imposed by state law would be duties that would exist in the absence of any collective agreement. State law would only have to be reviewed if an employer wanted to use the collective agreement to escape or modify some duty that would exist in its absence, and the employer would be aware of any state law that it wished to so modify. No employer could be deterred from negotiating some benefit for its employees if the negotiations could only make the employer better off with respect to its state law duties. Unions need to worry that their negotiations might result in the qualification of the state law rights of the employees they represent; but this concern presumably would be augmented if federal law governs waiver, because state law can be expected to require a clearer indication of the union's willingness to compromise rights secured by that same state law.[112]

To summarize, Jackson should have been permitted to argue in a federal court with diversity jurisdiction that, without reference to any duties expressly or implicitly created by a collective agreement,[113] Massachusetts law affords a right of action for the kind of mandatory drug testing to which he was subjected. Liquid Carbonic could defend either by demonstrating that it would not have violated Massachusetts law in

111. Again, it may be that federal labor laws other than section 301 should be interpreted to prevent states from insulating certain employment rights from waiver, *see infra* notes 158-89 and accompanying text, but the Court has made clear that this is not true for all such minimum rights. *See, e.g.*, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

112. One might, however, argue for a principle of section 301 law that allowed only the clear and unequivocal waiver of any minimum rights granted by state law. The argument would rest on the need to protect collective bargaining from the burden of unions having to worry about unintended waiver of these rights.

113. This means, for instance, that Jackson should not be permitted to argue that his expectations of privacy were enhanced by some special conduct of his employer that was in turn encouraged, even if not expressly required, by the collective agreement.

the absence of the collective agreement,[114] or by establishing that Massachusetts permits union modification or waiver of the privacy rights asserted by Jackson[115] and that the management rights clause or some other aspects of the agreement were sufficient to constitute that modification or waiver.

B. One Cheer For Lueck

It would have been possible for the Supreme Court to have mapped this approach in *Jackson* had it articulated in *Lingle* a different kind of test to distinguish the state law causes of action that should be preempted by section 301 from those that should not. Doing so would have required a different explanation of the Court's earlier decision to preempt a claim of bad faith implementation of an insurance contract under Wisconsin law in *Allis-Chalmers v. Lueck*.[116] Analysis of a case like *Lueck* in which preemption was proper, in contrast to cases like *Lingle* and *Jackson* in which it was not, provides an appropriate section 301 preemption test.

Roderick Lueck claimed that Allis-Chalmers had "intentionally, contemptuously, and repeatedly failed" to make payments due him under a disability insurance program guaranteed by the collective bargaining agreement governing his employment. Lueck argued that this constituted the tort of bad faith discharge of an insurance obligation under Wisconsin law.[117] The Wisconsin Supreme Court held that Lueck's claim was not preempted by section 301 because the "specific violation of the labor contract, if there was one, is irrelevant to the issue of whether the defendants [Allis-Chalmers and the insurer, Aetna Life & Casualty Company] exercised bad faith in the manner in which they handled Lueck's claim."[118]

The Supreme Court disagreed, stressing several salient points. First, Lueck's tort claim purported to define the meaning of the insurance obligation included in the collective bargaining agreement covering Lueck's employment.[119] Second, since Wisconsin law permits parties to an insurance contract to define what would constitute unreasonable or bad faith performance of the contract, "any attempt to assess liability here inevita-

114. This also means that Liquid Carbonic could defend by showing that it would not have violated Massachusetts law had it not taken particular action pursuant to the agreement.

115. As suggested above, *see supra* note 104, this seems doubtful.

116. 471 U.S. 202 (1985).

117. *Id.* at 206.

118. Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 566, 342 N.W.2d 699, 703 (1984).

119. 471 U.S. at 213-219.

bly will involve contract interpretation" that should be governed by section 301.[120] Third, "state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements."[121] And fourth, Congress would have wanted Lueck's claim to be preempted by section 301 because allowing it to proceed would "eviscerate a central tenet of federal labor-contract law under section 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."[122]

Seeds for many of the misconceptions discussed above concerning the section 301 preemption doctrines that were established in *Lucas Flour* are planted in this opinion. The Court relied on *Lueck* in framing its section 301 preemption test in *Lingle*.[123] *Lueck* has been read to require the preemption of any state cause of action that state law permits a union to waive or alter in collective negotiations, regardless of whether that cause of action would have existed in the absence of a collective agreement.[124] The *Lueck* Court's discussion of the section 301 policy to promote arbitration confused a federal labor policy that informs the content of section 301 law with the policy that dictates this law be applied uniformly in state as well as federal courts.

Nevertheless, an appropriate basic test for section 301 preemption can be extracted from the *Lueck* opinion. The Court's discussion there of the promotion of arbitration is presented only as an extra reason for preemption and does not generate the central analysis of the opinion. Moreover, the *Lueck* Court, unlike the *Lingle* Court, never states that any state cause of action that requires the interpretation of a collective agreement must be preempted. The *Lueck* Court instead stresses the question of whether the "state-law rights and obligations . . . exist independently of private agreements."[125] The *Lueck* Court also only states that state law rights that can be waived or altered in negotiations must be preempted if those rights do not exist "independent of any right established by contract . . . ."[126] Thus, although the *Lueck* opinion can be read more broadly, it is also possible to define its test to preempt only that state law that purports to grant some additional negotiable right to employees because of the terms of a collective agreement covering their

120. *Id.* at 218.
121. *Id.* at 213.
122. *Id.* at 220.
123. 486 U.S. at 405-06.
124. *See* White, *supra* note 76, at 397; Herman, *supra* note 26, at 634.
125. 471 U.S. at 213.
126. *Id.*

employment. The existence of such a right is dependent upon the terms of the agreement and therefore must be governed by section 301 law.

This test of dependence on the agreement derives directly from the policy underlying the *Lucas Flour* principle of uniformity. If state law could provide employees rights that would not exist in the absence of a collective agreement, employers would be more inhibited in the negotiation of such agreements. Employers might have to consider a variety of state laws from a variety of jurisdictions to understand the rights and obligations that they could be creating through their negotiations. Preempting state law rights that are dependent on the existence of an agreement lifts this burden from collective bargaining.

This *Lucas Flour-Lueck* preemption rule, like the rules established in the *Steelworkers' Trilogy*, is only a presumption. The *Lucas Flour-Lueck* presumption is that employers and unions do not intend to create obligations and rights defined by any state law through their negotiation of a collective agreement. Employers and unions thus could choose to reverse this presumption by embracing particular state law definitions of the rights and obligations created by their agreement. Doing so would incorporate state law as part of federal section 301 law.[127] Section 301 preemption law like other section 301 law thus assists in the interpretation of the intent of the parties.[128]

This section 301 preemption presumption makes sense for reasons similar to those that justify the *Steelworkers Trilogy's* section 301 presumptions. First, the Congressional policy favoring private ordering supports parties to collective agreements controlling the rights and obligations that they create by those agreements, just as much as it supports parties controlling the processes by which those rights and obligations are enforced.[129] Second, a presumption that parties to a collective agreement do not want to embrace state law is an efficient default rule because it expresses what would be the intent of almost all parties to collective agreements. Employers and unions are not likely to want to complicate the administration of agreements by creating unstated state law rights and obligations.[130] Third, this presumption is also efficient

127. This is in accord with the original announcement in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) of the power of federal courts to fashion federal law under section 301:

> Federal interpretation of the federal law will govern, not state law . . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights. *Id.* at 457.

128. Like other section 301 law, the preemption presumption must be applied by the courts, which must determine whether the presumption has been reversed in any particular case.

129. *Cf. supra* note 40 and accompanying text.

130. *Cf. supra* notes 45-47 and accompanying text.

because it forces the party that wishes to create an extra right or impose an extra duty as embedded in state law (generally the union)[131] to expressly inform the other party, who may not even know of the existence of that law, of its intent to do so. This requirement avoids strategic bargaining table machinations to induce the other party to expose itself to potential liability that it does not understand.[132]

This section 301 preemption rule explains *Lueck* much more satisfactorily than does any other analysis suggested by the *Lueck* opinion. For reasons similar to those set forth in the discussion of *Lingle* above,[133] the holding in *Lueck* cannot be justified as necessary to protect arbitration and the industrial peace that it promotes. Permitting Lueck to sue on his state law tort theory in state court would not have frustrated the union's attempt to secure contractual rights for represented employees by blocking Lueck's use of the arbitration system. It also would not have discouraged negotiation of an arbitration system; on the contrary, it probably would have given employers a further incentive to accept such a system as a way to resolve labor disputes that could otherwise generate more expensive litigation in state court. Even more clearly, preserving for an arbitrator the issue of whether Allis-Chalmers had breached its obligations under the collective agreement does not help insure the uniform interpretation of collective agreements. The uniform principles of section 301 law are general presumptions, like those of the *Steelworkers Trilogy*, to be applied by courts; arbitrators, by contrast, are free to apply variant notions of contract construction without particular regard to precedent.[134]

Nor can *Lueck* be explained simply by highlighting the need to interpret the collective agreement in order to resolve Lueck's state law claim. In the first place, this explanation alone does not distinguish cases like *Jackson* in which the collective bargaining agreement may need to be interpreted in order to address a claim by the defendant that the collective agreement detracts from the state law rights a plaintiff employee would have in its absence.

Second, this explanation may not even adequately rationalize *Lueck* itself. The Wisconsin Supreme Court in *Lueck* had stated that an interpretation of the collective agreement was not necessary because Allis-Chalmers could have committed the Wisconsin tort of bad faith dis-

131. But not always. *See* United Steelworkers v. Rawson, 110 S. Ct. 1904 (1990); Electrical Workers v. Hechler, 481 U.S. 851 (1987); *infra* notes 190-202 and accompanying text.

132. *Cf. supra* note 58 and accompanying text.

133. *See supra* notes 79-90 and accompanying text.

134. *See supra* note 107 and accompanying text.

charge of its insurance obligation without violating the collective agreement.[135] This makes sense; although the insurance contract was incorporated into the collective agreement, the tort could condemn intentionally discommoding and malicious insurance administration that was not also condemned by the contract. The tort may turn on the motivation of the insurer in processing claims, while the contractual violation could turn on whether the insured in fact received his due payments.

The Supreme Court in *Lueck* attempts to answer the Wisconsin Supreme Court by explaining that a collective bargaining agreement can condemn much more than the violation of its express terms; collective agreements also are read to create many implied rights and impose many implied obligations.[136] But this answer may miss the point. The Wisconsin Supreme Court seemed to assert that it did not care whether the collective agreement imposed some implied duty of good faith on Allis-Chalmers because Wisconsin law creates this duty as a part of public law to supplement private insurance contracts.

In attempting to establish that interpretation of the collective bargaining agreement was necessary in *Lueck*, the United States Supreme Court also makes what might have been a forced interpretation of Wisconsin law. The Court asserts that this law permits parties to an insurance contract "to bargain about what 'reasonable' performance of their contract obligation entails," and thus what might constitute bad faith performance.[137] Yet even if this questionable description of Wisconsin law is correct, the need to consider a claim by Allis-Chalmers that its collective agreement altered Wisconsin's presumption about what is in good faith does not alone explain why Lueck's state law claim had to be

135. 116 Wis. 2d at 569-71, 342 N.W.2d at 703-05.

136. 471 U.S. at 214-15.

137. *Id.* at 216-17. The *Lueck* Court cited no Wisconsin decision that allowed an insurer to defend a bad faith claim by reference to some reduced standard of reasonableness or good faith set forth in the insurance contract. It instead primarily relied on language in a 1931 Wisconsin decision that states that "bad faith means being recreant" to a duty set forth in an insurance contract. *Id.* at 216, quoting Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 13, 235 N.W. 413, 414 (1931). However, this language seems more supportive of the proposition that Wisconsin law makes its public law tort action dependent upon there being a contract violation, the proposition that seems to be directly rejected in the Wisconsin Supreme Court's opinion in *Lueck*. Furthermore, other recent Wisconsin Supreme Court opinions also seem to establish that the "tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the *relationship* established by contract." Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 687, 271 N.W.2d 368, 374 (1978) (emphasis supplied). *See also* Coleman v. American Universal Ins., Co., 86 Wis. 2d 615, 273 N.W. 220 (1979) (permitting third party injured employee to sue workers' compensation insurer through bad faith tort even in the absence of a contractual relationship). Furthermore, *Anderson*, the leading modern Wisconsin case, defines "bad faith" at great length without any reference whatsoever to the terms of an insurance contract. 85 Wis. 2d at 691-93. It seems clear that the Supreme Court reached to interpret Wisconsin law in a manner that would force it into the mold required by its section 301 preemption test.

denied. It does not explain why Lueck could not have proceeded with Allis-Chalmers' defense being treated under federal law if necessary.[138]

An adequate explanation of *Lueck* must also stress that any Wisconsin law on what is presumed to be bad faith administration of an insurance contract would not have been applicable to Lueck's case alone absent the collective agreement that incorporated the contract. Lueck was attempting to use state law to provide extra meaning to his union's contracting for disability insurance. In order to insure that such use of state law not inhibit collective bargaining, *Lucas Flour*'s reading of congressional intent in passing section 301 requires that federal law govern whether the contract should be read to permit this use. In order to facilitate efficient bargaining, it was reasonable for the Court to apply a federal law presumption of preemption, a presumption that the parties did not want such use of state law. The appropriate rule for section 301 preemption thus focuses on whether the state law claim is dependent on the existence of a collective agreement, rather than on whether the state law claim requires the interpretation of the agreement.[139]

This rule can be aligned readily with the doctrine the Court has adopted for determining whether state employment law claims artfully assert a federal cause of action appropriate for removal from state to federal court. It is of course black letter law that only state court actions that could have been filed in federal court originally may be removed to federal court by the defendant.[140] Thus, if there is no diversity of citizenship, employment law actions, like other actions brought in state court, are removable only if they present a federal question that is central to the plaintiff's properly pleaded complaint.[141] Under what it now terms the

138. *See supra* notes 106-08 and accompanying text. Indeed Wisconsin could argue strongly that its own law should be able to define how an obligation or right it creates can be altered. *See supra* notes 110-12 and accompanying text.

139. A concern with the preservation of the primary jurisdiction of the National Labor Relations Act does not provide an adequate basis for preemption of most cases like *Lueck* in which state law may provide a remedy for employer breaches of a collective bargaining agreement that stop short of repudiation of the agreement or the collective bargaining relationship. Although such breaches are arguably prohibited by sections 8(a)(5) and 8(d) of the Act, they are certainly not its central concern. They may, however, be of significant state interest. Furthermore, the critical issue in a section 8(a)(5) case before the Labor Board, whether the employer has modified a term or condition of employment contained in the agreement, will not normally be the central issue in any state law adjudication. *See* Sears, Roebuck & Co. v. San Diego County Dist. Council, 436 U.S. 180, 197 (1978); Farmer v. Carpenters, 430 U.S. 290, 296-97 (1977). The Supreme Court of Wisconsin thus was correct to find Lueck's action not preempted under the NLRA preemption doctrine articulated in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). *See* Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 566-76, 342 N.W.2d 699, 706-07 (1984).

140. 28 U.S.C. § 1441 (1992).

141. *See, e.g.*, Gully v. First National Bank, 299 U.S. 109 (1936).

"complete pre-emption corollary to the well-pleaded complaint rule,"[142] the Court has read *Lucas Flour* to mean that a federal question is central to any complaint that seeks to enforce a collective bargaining agreement.[143] However, since an anticipated federal law defense does not provide a basis for original federal court jurisdiction, it also does not provide a basis for removal.[144] Thus the Court in *Caterpillar v. Williams*[145] confirmed that an employer cannot obtain removal by claiming that a collective agreement waives or modifies a state law claim that does not itself rest on the existence of a collective agreement.

Lower courts, however, have been confused about the meaning of the *Williams* decision for the preemption by section 301 of state law claims that are not removable to federal court. Some courts have merged preemption with removal; they have assumed that claims that could not be removed under the section 301 complete preemption doctrine also should not be preempted.[146] Other courts, recognizing the distinction between removal and preemption, have dismissed as preempted state law claims that could not be removed because they involve collective agreements only as defensive shields.[147] The *Williams* Court itself seems to anticipate that state as well as federal courts would use federal section 301 law to determine whether a collective agreement provides a defense to an independent state law claim, but it also seems to anticipate that these claims would proceed without being dismissed for failing to exhaust the arbitration process.[148]

142. Caterpillar v. Williams, 482 U.S. 386, 393 (1987).

143. *See* Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 23 (1982); Avco v. Aero Lodge Machinists 735, 390 U.S. 557, 558 (1968).

144. *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983).

145. 482 U.S. 386 (1987).

146. *See, e.g.*, Local No. 57 v. Bechtel Power Corp., 834 F.2d 884, 889-90 (10th Cir. 1987). *See also* Schwartz & Parrot, *A New Look at Federal Labor Law Preemption: Unionized Employees' Claims in State Court*, 7 ST. LOUIS U. PUB. L. REV. 297, 311-12 (1988); Yonover, *supra* note 78, at 84-85 (1989).

Some courts, moreover, have merged the preemption and removal issues in a manner that is directly inconsistent with the holding of *Williams*, by approving the removal of cases to federal court because a defense requires the interpretation of a collective agreement. *See* Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988).

147. *See, e.g.*, Hanks v. General Motors Corp., 859 F.2d 67, 70 (8th Cir. 1988). Given her advocacy of broad section 301 preemption, Professor White not surprisingly approves of these decisions. *See* White, *supra* note 76, at 408-10.

148. The *Williams* court states:

> [T]hat when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule . . . that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

A proper section 301 preemption analysis would avoid this confusion by aligning the preemption of claims based on negotiable state law rights and obligations with the removal of such claims. The *Williams* rule for removal could be identical to that for preemption—only state law claims that depend on the existence of a collective agreement could be removed from a state court in the absence of diversity jurisdiction, and only such claims could be dismissed by an application of a section 301 presumption that the parties did not want their agreement to provide a basis for state law claims. Furthermore, for the reasons given above,[149] and contrary to the dicta of *Williams*, any defensive claim that an independent state law cause of action has been waived or modified in a collective agreement should be treated under the state law that defines the cause of action, rather than under section 301 law.

IV. NONNEGOTIABLE STATE LAW RIGHTS

The problem the Court has had reaching the straightforward section 301 preemption doctrine advocated above in part derives from its focus on the mechanics of section 301 preemption through the interpretation of a collective agreement. The Court would do better by focusing on the ultimate purpose of the requirement of section 301 uniformity—the encouragement of free collective bargaining. The result of the Court's misfocus has been a rule that seems to require preemption in all cases that must involve a significant interpretation of an agreement (including many for which preemption is not appropriate), but that provides no guidance for cases involving nonnegotiable state law claims that state law dictates not be governed by the terms of an agreement. In this section of the essay I will argue that the Court could have decided *Lueck* even more convincingly by resting not only on a proper section 301 preemption principle, but also on broader labor law preemption doctrine derived directly from the goal of encouraging free collective bargaining, the policy underlying section 301 uniformity. Since this latter doctrine would not depend on the existence of a question of contract interpretation, it could apply to nonnegotiable state minimum employment rights. I will also explain how this doctrine might be formulated by a semi-revival of the *Teamster v. Oliver* decision,[150] and note how it could have simplified

482 U.S. at 398-99.

Professor White recognizes that this language stands against her position that collective bargaining defenses should lead to preemption of state law claims that are themselves made independent of the agreement, but she attempts to dismiss the language as "less than precise" "dicta." White, *supra* note 76, at 409 n.140.

149. *See supra* notes 110-13 and accompanying text.

150. 358 U.S. 283 (1959).

the Court's decision last term in the *Steelworkers v. Rawson* case.[151]

A. An Oliver-Machinists *Principle of Preemption*

In *Lingle* the Court expressly reserved deciding whether federal law governing collective bargaining should be read to give authority to unions to waive any state law rights that the state purports to make nonwaivable by the parties to a collective bargaining agreement.[152] In *Lueck* the Court had avoided the issue by repeatedly linking its preemption of the Wisconsin bad faith tort to its negotiability.[153] The Court questionably interpreted Wisconsin law[154] to establish that the obligations imposed by the tort on which Lueck relied could be altered by the parties to a collective agreement by bargaining about what reasonable performance of the insurance obligation they created entails.[155] *Lueck* thus left open a question not resolved by *Lingle*: What if Wisconsin law, as is fully plausible, had provided that the assumption of an insurance obligation imposes certain additional duties of good faith that cannot be waived or altered? Would the application of this law to an insurance obligation undertaken in a collective bargaining agreement be preempted by federal labor law?

An employer charged with bad faith in an action under such nonnegotiable state law might argue for section 301 preemption by stressing that its obligation to insure was undertaken in a collective bargaining agreement and is therefore not independent of that agreement. But the

151. 110 S. Ct. 1904 (1990).

152. 486 U.S. at 409-10 n.9. (Citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), a case treating the waiver of rights under the National Labor Relations Act, the Court stated that any such waiver at a minimum would have to be "clear and unmistakable.") *Id.*

Consistent with its general section 301 preemption standard, the *Lingle* Court also stated in another footnote that a "nonnegotiable" state law remedy that "turned on the application of a collective-bargaining agreement for its application . . . would be preempted by section 301." 486 U.S. at 407-08 n.7. This statement may seem in some tension with the reservation in footnote 9, but in footnote 7 the Court probably was contemplating a state law that provided an extra remedy for a violation of a collective agreement, but that the parties could not waive. This would have been the case, for instance, in *Lueck* if the Wisconsin bad faith tort on the one hand had been dependent on finding a violation of the insurance obligation in the collective agreement, but on the other hand had not been waivable. As argued in the next page of text, *see infra* note 156 and accompanying text, the assumption of footnote 7 about the scope of section 301 preemption, like the *Lingle* section 301 preemption test generally, is flawed.

153. *See, e.g.*, 471 U.S. at 212-13 (section "301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law . . . . state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements.").

154. *See supra* note 137.

155. 471 U.S. at 216-18. "We pass no judgment on whether an independent, nonnegotiable, state-imposed duty which does not create similar problems of contract interpretation would be preempted under similar circumstances." *Id.* at 217 n.11.

aggrieved employee could respond by stressing that section 301 empowers federal courts (and directs state courts) to use federal law only to interpret what employers and unions contract for in collective agreements; if the state law is nonnegotiable, the state does not care about whether the parties wanted to create the additional obligation this law imposes. Any interpretations of the agreement, and therefore any section 301 presumptions about the intent of the contracting parties, are irrelevant[156] if the state imposes a nonnegotiable good faith obligation as a matter of law.[157]

By widening its focus from that of section 301, however, the *Lueck* Court could have avoided uncertainty about the preemption of nonnegotiable state rights and obligations; it could have obviated the need for the inevitably uncertain analysis of state law by a federal court that the Court felt compelled to give Wisconsin law; and it could have made its decision to preempt Lueck's claim more convincing. There are two very strong interrelated reasons to preempt actions under state laws like that of the Wisconsin tort relied upon by Lueck, regardless of whether the state law permits waiver or alteration in the collective agreement. Each of these reasons derives from the strong federal labor law policy favoring the encouragement of free collective bargaining.

The first informs the *Lucas Flour* uniformity principle that is the basis for section 301 preemption. Whether or not a right or obligation is negotiable under state law, the fact that right or obligation can be given legal force by the negotiation of a collective agreement can inhibit collective bargaining by making its impact more uncertain. An employer negotiating a collective agreement would have to be as wary of creating some additional nonnegotiable obligation under state law as it would of creating a supplementary negotiable obligation. Allis-Chalmers, for instance, would have to be equally concerned about state laws that impose nonnegotiable obligations on those who undertake insurance obligations as about state laws that impose negotiable obligations. Thus, the federal labor policy underlying section 301 preemption is applicable to the preemption of certain nonnegotiable state rights. This is true even if uniform principles or presumptions for contract interpretation, and thus

156. Professor Brower seems to have appreciated this. *See* Brower, *supra* note 105, at 435.

157. If the state imposes such a nonnegotiable obligation, contrary to the argument of Lueck's counsel before the Supreme Court, *see* 471 U.S. at 215 n.10, it should also be irrelevant whether the collective bargaining agreement also provides a remedy for bad faith discharge of an insurance obligation. A nonnegotiable duty may be one the state wishes to impose regardless of arrangements made in a collective agreement.

section 301 law itself, are not applicable because the state law does not care about the meaning of any private bargain.

Second, laws like that relied upon by Lueck, regardless of whether they are fashioned by the state to be nonnegotiable, inhibit free collective bargaining in an additional way. They render more difficult the negotiation of the particular contractual benefit or obligation that invokes the supplementary right or obligation created by state law. For instance, had the Wisconsin bad faith tort been nonnegotiable, it would have made the grant of disability insurance potentially more expensive for Allis-Chalmers. The company therefore might have been more resistant to the grant of this particular benefit in negotiations. Any nonnegotiable state law that leverages some contractual benefit would inevitably have the effect of rendering that benefit more expensive and therefore more difficult to achieve in negotiations. Allowing the state to use state law in this manner thus would allow the state to influence the substantive terms of collective agreements.

Both of these reasons for preempting certain nonnegotiable state law rights of action could be made part of a broader labor law preemption principle than one tied to section 301 alone. The principle could be broadly stated as requiring the preemption of any state law granting employees represented by unions minimum rights or benefits that make it more difficult for unions to negotiate other rights or benefits within the scope of mandatory bargaining defined by the National Labor Relations Act.[158] This principle could be derived from the Court's decision in *Teamsters v. Oliver*[159] which held that Ohio could not use its antitrust laws to prevent a union from negotiating a clause, within the mandatory scope of bargaining, that protected the wages of the employees it represents.[160] The decision thus defended union negotiation of employee ben-

158. It should, however, be acknowledged that the broader preemption principle elaborated below would not support removal of state court actions to federal court under the complete preemption doctrine of Avco v. Machinists, 390 U.S. 557 (1968), because claims based on nonnegotiable state law rights do not seek simply to enforce an agreement resulting from collective bargaining. *See supra* notes 140-49 and accompanying text. Nonnegotiable state rights, even if conditioned on the provision of some benefit in a collective agreement, have a public law basis independent of the intent of that agreement.

As the Court explained in Caterpillar v. Williams, 482 U.S. 386 (1987), preemption doctrine other than that which can be expressed in section 301 law must be dependent on implementation by state, as well as federal courts subject to Supreme Court review.

159. 358 U.S. 283 (1959).

160. Ohio had held its antitrust law to be violated by a collective agreement that prescribed the "terms and conditions which regulate the minimum rental and certain other terms of lease when a motor vehicle is leased to a carrier by an owner who drives his vehicle in the carrier's service." 358 U.S. at 284-85. "The union justified the [prescription] as necessary to prevent undermining of the negotiated drivers' wage scale said to result from a practice of carriers of leasing a vehicle from an owner-driver at a rental which returned to the owner-driver less than his actual costs of operation, so

efits from the inhibition of state law.

The broad preemption principle suggested above also could be stated as an important part of the preemption doctrine the Court now refers to as *Machinists* preemption, after its decision in *Machinists v. Wisconsin Employment Relations Commission*.[161] In *Machinists*, as in *Teamsters v. Morton*[162] on which it relied, the Court explained that Congressional passage of the National Labor Relations Act expresses an intent that certain labor-management relations conduct be "unregulated because left to be controlled by the free play of economic forces."[163] The Court found in *Machinists* and *Morton* that Congress intended that certain forms of union protest activity be neither protected or prohibited by either federal or state law so that "the balance of power between labor and management" necessary for the collective bargaining contemplated by the Act not be upset.[164] Citing *Oliver* in *Machinists*, the Court suggested that its ultimate concern was in part that state law not "influence . . . the substantive terms on which the parties contract."[165] "Our decisions . . . have made it abundantly clear that state attempts to influence the substantive terms of collective bargaining agreements are as inconsistent with the regulatory scheme as are such attempts by the NLRB . . . ."[166] The Court in *Lueck* thus could have relied on both *Oliver* and *Machinists* to apply a preemption principle that restricts state law from influencing collective bargaining on those topics that Congress intended to be negotiated under the free play of economic forces that it left unregulated.

However, there would be two major difficulties with such broadly formulated preemption doctrine. First, most clearly in *Metropolitan Life Insurance v. Massachusetts*,[167] decided in the same term as *Lueck*, the Court has limited the application of the *Oliver* and *Machinists* precedent to state laws that provide minimum employment rights or guarantees.[168] In *Metropolitan Life* the Court unanimously upheld a Massachusetts law that required employers that provide their employees a health care plan

that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operating expenses over the rental he received." *Id.* at 289.

161. 427 U.S. 132 (1976).

162. 377 U.S. 252 (1964).

163. 427 U.S. at 140.

164. 377 U.S. at 260. In *Morton* the Court held that Ohio law could not prohibit a form of secondary boycott left unregulated by the National Labor Relations Act. In *Machinists* the Court struck down a state law penalizing a concerted refusal to work overtime.

165. 427 U.S. at 153 (quoting NLRB v. Insurance Agents International, 361 U.S. 477, 490 (1960)).

166. 427 U.S. at 153.

167. 471 U.S. 724 (1985).

168. *See also* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19-22 (1987).

covering hospital and surgical expenses to also provide certain specified minimum mental health-care benefits. The Court directly addressed an argument that the *Oliver* and *Machinists* lines of cases required the preemption of such minimum-benefits statutes as applied to employees covered by a collective agreement.[169] The Court argued that the "NLRA's declared purpose . . . to remedy '[t]he inequality of bargaining power between employees . . . and employers' . . ."[170] is not at all disturbed by minimum-benefit legislation. Indeed, "[i]t would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers."[171] Not surprisingly, therefore, *Metropolitan Life* has been understood to render *Oliver* without precedential authority for general state minimum benefit laws[172] and to limit *Machinists* and *Morton* to the preemption of state laws regulating the processes of collective bargaining, rather than mandating the substantive terms of agreement.[173]

Second, and more fundamentally, the Court would be correct to reject as inconsistent with any plausible Congressional intent doctrine that required the preemption of any state law that might influence the terms of collective agreements by making the negotiation of particular terms more difficult. Such preemption doctrine could apply to any minimum-benefit legislation that required employers to compensate their employees in part by providing particular rights or benefits that the state deemed essential. This is true because any employer that must undergo the cost of providing one particular benefit will be somewhat less able and willing to agree in negotiations to provide any other particular benefit. For in-

169. 471 U.S. at 749-58.

170. *Id.* at 753 (quoting NLRA, section 1, 29 U.S.C. § 151).

171. *Id.* at 756. The *Metropolitan Life* Court in part relied on Malone v. White Motor Corp., 435 U.S. 497 (1978), which also seemed to have limited the force of *Oliver* by declaring that "there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." *Id.* at 504-05. However, *Malone*'s holding that a pre-ERISA Minnesota law establishing minimum funding and vesting levels for employee pension plans was not preempted could easily be explained as turning on the Court's interpretation of the intent of Congress in the Welfare and Pensions Plans Disclosure Act of 1958 to leave the regulation of pension plans to the states. Indeed such a narrow explanation of *Malone* was adopted by the Court in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), holding a state law preempted by ERISA, and relying in part on the policy expressed in *Oliver* to preclude "state interference with labor-management negotiations." *Id.* at 525-26 and n.23.

172. *See* Herman, *supra* note 26, at 625-39. Inasmuch as Ohio did not object to unilateral employer regulation of the rental and compensation for owner-operated trucking equipment, *Oliver* still can be read to support the preemption of state laws that attempt to proscribe collective bargaining agreements on topics that are otherwise unregulated. *See* Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 298 (1980).

173. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19-22 (1987).

stance, Illinois employers required by the law upheld in *Lingle* to be subject to a state remedy for retaliatory discharge will have to include the possibility of incurring expenses under such a remedy in their expected labor costs. Theoretically, at least, the increase in expected costs due to this inclusion could change some employers' calculations of whether some other benefit should be resisted in collective bargaining. Some employers thus might force unions to agree effectively to have represented employees compensate employers for the benefit required by state law. In reality the process of collective bargaining and the potentially relevant economic factors are much too complicated to predict the effect of the grant of any particular minimum benefit on a union's ability to obtain any other particular benefits,[174] but some effect is clearly plausible.

Such a speculative effect, however, should not warrant the preemption of all state minimum benefit law without some direct expression of Congressional intent. As stated by the Court in *Metropolitan Life*, "there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization."[175] Therefore, if the *Oliver* and *Machinists* line of cases are to provide preemption doctrine that can realistically be used to clarify the treatment of state laws like that invoked by Lueck, whether or not these laws are negotiable, that doctrine must be narrowed from the broad formulation given above.

One narrowing principle is readily suggested by a comparison between the state laws invoked in the *Lingle* and *Lueck* cases. Illinois did not condition its grant of a retaliatory discharge cause of action on an

174. Potentially relevant to the question of whether any given employer would or could extract in negotiation with a union compensation for the costs of some minimum state benefit, for instance, would be the level of surplus extracted by the employer from its product market, the tightness of the labor market confronting the employer, the substitutability of capital for labor in the employer's production processes, the geographical mobility of those processes, and the level of support and solidarity enjoyed by the union. All of these factors affect the extent to which the grant of minimum benefits can change the distribution of a particular firm's resources between capital and labor. *See generally* C. CRAYPO, THE ECONOMICS OF COLLECTIVE BARGAINING, ch. 2 (1986); J. KREPS, P. MARTIN, R. PERLMAN & G. SOMERS, CONTEMPORARY LABOR ECONOMICS AND LABOR RELATIONS 189 (1980).

It is even plausible that the grant of certain minimum benefits not only redistributes social resources from capital to labor, but also actually facilitates a union's negotiation of certain additional benefits. For instance, the grant of some judicial rights of action might make the grant of an arbitration remedy more attractive to an employer that wants to avoid use of the judicial remedy. *See supra* notes 88-89 and accompanying text. Minimum wage legislation may also facilitate an increase in real wages for union employees of employers with some level of surplus to share; strong unions may be able to use wage minima to push up the pay scales that organize the internal labor markets of such employers.

175. 471 U.S. at 756. *See also* Herman, *supra* note 26, at 644-47 (relying on legislative history of Wagner Act).

employee's obtaining some other benefit from his or her employer; the cause of action was given to all employees eligible under state law for workers' compensation benefits. Wisconsin, by contrast, conditioned the availability of the tort action invoked by Lueck on the secural of some insurance obligation. Wisconsin law thus purported to guarantee an additional benefit "Y" for any employee granted a benefit "X" by his or her employer. A strong argument can be made that such conditional, if X - then Y, state benefit laws inhibit collective bargaining in a significant way that traditional, nonconditional laws like the retaliatory discharge provision invoked by Lingle do not.

Conditional minimum benefit laws not only increase employers' general labor costs and thus plausibly threaten to make the negotiation of any other benefit somewhat more difficult for unions; they make the negotiation of the particular benefit on which the extra benefit is conditioned especially costly. They thus not only might have a small effect on the negotiation of other benefits in general, they also discourage the negotiation of one benefit in particular. If that benefit is one, such as disability insurance, that Congress intended to be obtainable by unions through the processes of mandatory bargaining under the Labor Act, the argument for the preemption of the state conditional minimum benefit seems much stronger than that for the preemption of any nonconditional benefit. The latter kind of benefit does not discourage the negotiation of any particular other benefit as long as the union retains other chips for bargaining table negotiations.[176] Furthermore, the uncertainty in collective bargaining that can be engendered by allowing states to require employers that grant certain benefits to also grant certain additional benefits[177] is not created by allowing states to grant minimum benefits that are not dependent on any terms in an employment contract.

This distinction accords with the *Oliver* decision. It places conditional nonnegotiable minimum benefits laws along a continuum, one pole of which is illustrated by the antitrust law preempted in *Oliver*. Conditional minimum benefit laws are closer to this *Oliver* pole than are nonconditional benefit laws. The *Oliver* Court overturned Ohio's prohibition of a union's negotiation of a particular kind of wage protective provision that the Supreme Court found within the Labor Act's scope of mandatory bargaining. The Court thereby insured that a state would not

176. Theoretically a state could mandate such a comprehensive set of benefits as to leave little room for collective bargaining of any other benefits. This theoretical possibility has surely not yet been realized and probably never would be. If it were, the Court could distinguish *Metropolitan Life* to preempt the comprehensive state law.

177. *See, e.g., supra* notes 126-28 and accompanying text.

prevent a union from using the processes of collective bargaining to obtain a particular benefit. While conditional benefit laws do not prevent the negotiation of the particular benefit on which additional benefits are conditioned, for the reasons just explained they can discourage the negotiation of such a benefit more than can a nonconditional benefit law.[178]

Explaining *Oliver* as prohibiting state discouragement of union extraction of particular benefits within the scope of mandatory bargaining, while permitting state prevention of employer extraction of waivers of minimum employment rights granted by the state, does weave an asymmetry into labor preemption law. This asymmetry permits states to protect employee-rights from negotiation, while preventing them from offering the same protection to certain legal rights granted employers. However, this asymmetry is consistent with the redistributive goals of the Labor Act as stressed in *Metropolitan Life*.[179] Although it is problematic whether any particular nonnegotiable minimum benefit can effect a redistribution of any particular firm's resources to employees,[180] the Court has fairly read the Labor Act not to express any Congressional intent to prevent the states from making the same attempt to do so for union employees as for nonunion employees.[181] Furthermore, state interests in paternalistic protection of employees seem much stronger than state interests in paternalistic protection of relatively sophisticated employers.

However, the distinction drawn above between the preemption of conditional minimum benefit laws and the nonpreemption of nonconditional minimum benefit laws is not as consistent with the actual holding of *Metropolitan Life* as it is with much of its analysis or with the holding of *Oliver*. The reason is simply that *Metropolitan Life* upheld a conditional minimum benefit law. The Massachusetts statute challenged there required only employers that provide health-care plans covering hospital and surgical expenses to provide specified minimum mental health-care benefits. The defendant insurance companies argued that federal labor law prevented Massachusetts from requiring collective bargaining agree-

178. Dissenting from the Court's upholding of a pre-ERISA Minnesota law imposing minimum vesting and funding limits on pension plans, Malone v. White Motor Corp., 435 U.S. 497, 516 (1978), Justice Powell exhibited an appreciation of how conditional benefit laws can have an inhibitory effect on collective bargaining similar to that which influenced the *Oliver* decision. "Minnesota . . . imposes a principle of direct liability that well may discourage employer participation in matters of such vital importance to working men and women." *Id.*

179. 471 U.S. at 753-56.

180. *See supra* note 174.

181. "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." *Metropolitan Life*, 471 U.S. at 756.

ments to grant mental health benefits whenever they provide for other health insurance coverage. Although *Metropolitan Life* came to the Court on review of a state court action by the state of Massachusetts to compel insurers to provide the mandated benefits whenever the conditions of the law were satisfied, the preemption analysis just given could have been applied in the same manner as in an action by an individual employee like Lueck to obtain the benefit promised by state law. The finding of nonpreemption in *Metropolitan Life* meant that the provision of health insurance will be more expensive for Massachusetts employers and therefore will be more difficult to extract in bargaining.[182]

The potential tension between *Lueck* and *Metropolitan Life* is not treated in either opinion, though Justice Blackmun wrote during the same term for a unanimous Court in each. The tension could be eased in any of three ways, each of which would preserve a role for the *Oliver-Machinists* principle advocated above in the preemption of state law. First, *Lueck* can be treated as turning on the Court's questionable finding that the bad faith tort on which Lueck relied was in fact negotiable under Wisconsin law.[183] This treatment of *Lueck* would entail acceptance of states' discouraging the negotiation of particular benefits, like disability or health insurance, within the mandatory scope of bargaining, by adding to their costs the costs of other mandatory benefits. It would not necessarily entail acceptance of other state laws that more directly discourage particular benefits and thus come closer to the *Oliver* pole of total prohibition.[184]

Second, *Metropolitan Life* could be drained of precedential authority by some future acceptance by the Court of the distinction between conditional and nonconditional minimum benefits.[185] The Court in *Metropolitan Life* considered only the insurance companies' argument that *Oliver* and *Machinists* require the preemption of all state laws that require any

182. The state minimum funding and vesting pension law upheld in Malone v. White Motor Corp., 435 U.S. 497 (1978), was also a conditional law.

183. *See supra* note 137.

184. *See infra* note 198 and accompanying text.

185. *Metropolitan Life* could be explained as correct on the basis of the McCarran-Ferguson Act, which reserves authority for the states to enact laws "which relate to the regulation or taxation of such business," (insurance), 59 Stat. 34, 15 U.S.C. § 1012(a). The Court in *Metropolitan Life* stated that they would have found the Massachusetts mental health care benefit law not preempted because of this Congressional reservation of power for the states, even if the court had chosen to interpret *Oliver* broadly. 471 U.S. at 752 n.29.

A similar congressional intent to reserve power for the states could be found for other conditional state minimum benefit laws. For instance, state anti-discrimination laws that require granting benefits for all workers equal to those granted some favored status group, such as white males, can be viewed as effectively conditional minimum benefit laws that Congress clearly intends to preserve after passage of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17.

minimum benefits for union-represented employees; it did not consider the more limited claim that collective bargaining is excessively inhibited only by conditional laws.[186] Had it done so it might have distinguished the minimum benefit laws that existed at the time of the passage of the NLRA and that were apparently accepted by Congress.[187]

The third, and perhaps best option, would be to distinguish the kind of conditional benefit law invoked in *Metropolitan Life* from the kind considered in *Lueck*, preempting only the application of the latter to employees covered by collective agreements. The important difference between the laws treated in the two cases is that the Massachusetts law required the provision of an additional independent substantive benefit (mental health care), while the Wisconsin law provided additional remedial protection (a tort-based right-of-action) for a benefit created by the collective agreement. It is true that the Massachusetts law might be potentially as costly for employers and therefore as much of a discouragement of the negotiation of the triggering benefit, but a law that requires remedial processes other than those negotiated might be viewed to intrude more on the collective bargaining process. The point is not that a law like that of Wisconsin's should be disfavored because it threatens industrial stability by discouraging use of the arbitration process; this should not be the case as long as a bargained for arbitration process remains open as an alternative to employees.[188] Rather the point is that such a law prevents collective bargaining parties from defining the rights they create by tailoring the procedural system for protecting those rights. Furthermore, a case can be made that a state has a stronger interest in laws like that of Massachusetts which use the provision of one substantive benefit to determine whether it is economically feasible to provide

186. Even if *Metropolitan Life*'s protection of state minimum benefit laws from the reach of *Oliver* is limited to those laws that are not conditional, this protection would still be important for a significant class of possible preemption cases involving nonconditional state laws. *See, e.g.*, Beckwith v. United Parcel Service, 889 F.2d 344 (1st Cir. 1989) (relying on *Metropolitan Life* to find not preempted state law prohibiting employers from satisfying claims through payroll deductions made a condition of employment).

187. States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples . . . . State laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payment to employees for time spent at the polls or on jury duty all have withstood scrutiny.

471 U.S. at 756 (citations omitted).

It is true, however, that preemption of all conditional laws like that upheld in *Metropolitan Life* would significantly impede the contemporary fashioning of minimum benefit laws. Massachusetts, for instance, might have wanted to require only employers who determine that they can afford general health insurance for their employees to also provide mental health benefits.

188. *See supra* note 86 and accompanying text.

another substantive benefit that the state would like to guarantee, than a state has in a law that determines how a right created by a private agreement between relatively sophisticated parties like unions and employers should be protected.[189]

B. Application to Rawson

Whichever of these three options is chosen, the *Oliver-Machinists* preemption principle suggested here could still play an important role supplementing section 301 preemption doctrine and thereby alleviating pressure to manipulate state law to make it vulnerable to the Court's inflated section 301 doctrine. This role is made even more clear by the Court's decision last term in *Steelworkers v. Rawson*[190] than by the *Lueck* decision. *Rawson* held that section 301 required the preemption of a claim by survivors of several deceased Idaho miners against a union for negligently inspecting a mine before an accident that caused the miners' deaths. The Court concluded that since the union's participation in mine inspections was made possible by provisions in their collective bargaining agreement with the management of the mine, any duty in connection with the inspection had to arise out of the collective agreement and be dependent upon an analysis of its terms.[191]

As explained by Justice Kennedy in dissent,[192] this reasoning ignored the state law on which the Supreme Court of Idaho had determined that the miners' survivors could base an unpreempted action for negligence. That law, long and well established in Idaho, is the general tort doctrine that imposes a duty to act with care on any party who undertakes to render services to another that may be important to that other's well being, whenever that undertaking induces reliance or the failure to perform it with care increases the risk of harm.[193] This law could have been used against the union without any interpretation of the collective bargaining agreement that required the inspection that was allegedly negligent. Nor was application of this law dependent on the collective agreement. The law could be applicable to any inspection

189. State interests need not be weighed if Congress has determined that state law must give way. *See* Brown v. Hotel and Restaurant Employees, 468 U.S. 491, 502 (1984). But the probable weight of state interests in a class of cases might be relevant to the preemption line that Congress would want to draw.

190. 110 S. Ct. 1904 (1990).

191. *Id.* at 1910-11.

192. *Id.* at 1913.

193. This paraphrases a standard from the RESTATEMENT (SECOND) OF TORTS § 323 (1965), relied upon by the Idaho Supreme Court in *Rawson*. Rawson v. United Steelworkers of America, 111 Idaho 630, 637, 726 P.2d 742, 749 (1986). As Justice Kennedy noted, section 323 has been applied consistently by the Idaho courts to a variety of cases. *See* 110 S. Ct. at 1914.

conducted by a union, whether or not authorized by an agreement with the employer. The state law duty recognized by the Idaho Supreme Court arose from union agents' participation in an inspection that could have increased the risk of harm to plaintiffs, not from any right or obligation of the union to perform such an inspection.[194]

Rawson therefore was a very different case from *Electrical Workers v. Hechler*, where the Court easily applied *Lueck* to preempt a Florida employee's suit against her union for failing to fulfill a duty assumed under a collective agreement to ensure her a safe work place.[195] The *Hechler* claim required interpretation of the agreement to determine whether the union in fact assumed such a duty. It also was dependent on the agreement because Florida state law imposes no duty of care on unions to ensure a safe working environment in the absence of some private contractual commitment.[196]

194. The union might have argued in *Rawson* that state tort law limits the duty of inspectors to that inspection that they undertake to make and that defining the extent of the undertaking would have had to depend on an interpretation of the collective agreement. Such an argument was successfully made in a similar case applying Illinois law, Sluder v. Mine Workers, 892 F.2d 549 (7th Cir. 1989). However, the theory applied by the Idaho Supreme Court in *Rawson*, and probably available under Illinois law in *Sluder* as well, was that the inspection itself defined the undertaking, whether or not that inspection was coterminous with the inspection authority granted union officials by the collective agreement.

195. 481 U.S. 851 (1987). An earlier decision of the Idaho Supreme Court in *Rawson* had been vacated and remanded by the Supreme Court for reconsideration in light of *Hechler*. Steelworkers v. Rawson, 482 U.S. 901 (1987). The Idaho court adhered to its holding of nonpreemption by distinguishing *Hechler* as requiring reference to the collective bargaining agreement to determine the standard of care required of the defendant union. 115 Idaho 785, 770 P.2d 794 (1988).

196. *See* 481 U.S. at 859-62. The *Hechler* Court thus made clear that section 301 law would have to determine whether the parties intended to give employees any right to enforce a duty imposed on the union to ensure a safe work place. The *Hechler* Court did not, however, indicate how section 301 law might make that determination. It instead remanded the case for lower court consideration of whether any possible section 301 cause of action of Hechler's might be barred by the short six months statute of limitations the Court has placed on duty of fair representation suits. *Id.* at 863-65 (noting DelCostello v. Teamsters, 462 U.S. 151 (1983). In a short concurring opinion Justice Stevens stated that the Court should have dismissed the complaint because any claim that a collective bargaining agreement negotiated by a union with an employer on behalf of represented employees could create some right of action for the employees against the union is beyond understanding. 481 U.S. at 865. Though it did not adopt Justice Stevens' summary position, the six Justice majority in *Rawson* (including Justice Stevens) did suggest that section 301 law should utilize a presumption against claims by employees against their unions based on collective agreements, a presumption that could be overridden only by "language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees." 110 S. Ct. at 1912. The Court elaborated that such intent cannot be found in provisions that permit or even require the union to inspect or otherwise provide for industrial safety, for such provisions are limitations on the general authority of employers to control the workplace, not promises of the union to the employer, let alone to employees. In my view a very heavy presumption is appropriate in these cases. The intent to create potential union liability to employees through collective agreements is neither likely nor desirable under federal labor law. *Cf. supra* notes 45-63 and accompanying text. Collective bargaining should not be used as a mechanism for employers to represent employees against a union. Such use of the process by an employer seems inconsistent with its duty to treat certified unions as exclusive bargaining agents.

Nevertheless preemption was certainly appropriate in *Rawson*. It was appropriate not because of the need for uniform federal law to interpret collective agreements, but rather because allowing claims like those of the *Rawson* plaintiffs would significantly discourage union negotiation of an employee benefit unions have increasingly been seeking—participation by employee representatives in the protection of the safety of the work environment. If unions are vulnerable to substantial judgments for not being as effective as they might have been in improving workplace safety, it will not be long before they cease attempting to negotiate this participation. The *Rawson* claim, much more clearly than the conditional laws treated in *Lueck* and *Metropolitan Life*, would inhibit what the NLRA was intended to encourage—the free negotiation of benefits within the scope of mandatory bargaining. Thus, even if neither of the two types of conditional laws should be preempted under the *Oliver-Machinists* principle explained above, the *Rawson* plaintiffs' claim should be.[197] The fact that these plaintiffs did not necessarily seek more than an application of general Idaho tort doctrine, which would apply regardless of the union's or any other party's reason for undertaking to inspect, should not affect this conclusion for cases in which the union's inspection was a collectively bargained attempt to benefit employees. Even the application of general state laws should not be permitted in cases where that application comes as close to the total discouragement of an employee protective provision as does the law Idaho sought to apply in *Rawson*.[198]

The *Rawson* Court was thus correct to stress the importance of the

197. *Oliver-Machinists* preemption would also be needed in cases where an injured employee asserts that state law requires unions to accept exposure to tort damages for breaching a contractual duty to insure a safe workplace. For instance, *Oliver-Machinists* preemption might have been helpful in the *Hechler* case. The Florida law invoked by Sally Hechler might have conditioned the imposition of a nonnegotiable tort-based public duty on a union's assumption of a contractual duty in a collective agreement. Section 301 would not alone be adequate to preempt such a law because Florida could claim that it did not care about any intent of the parties to such an agreement to exempt the union from tort liability. The Florida law would be a nonnegotiable conditional minimum benefit law that should be preempted because of the particular way that it would discourage collective negotiation of the employee benefit of union authority to help secure a safe workplace. *See also* Sluder v. Mine Workers, 892 F.2d 549 (7th Cir. 1989) (state tort law dependent on contractual duty to inspect, but probably not negotiable).

Of course in order to establish tort liability against a union for negligent participation in an inspection, an injured plaintiff would have to demonstrate that the negligence caused the accident and this might require determining whether the union had authority to correct the risk it should have spotted. This does not, however, mean that the state tort law cares whether the parties wanted to permit a tort action.

198. In my view whether a state law is specifically directed toward labor-management relations, or is rather of general application, is most relevant for consideration of *Machinists* preemption of state laws that may affect the balance of negotiating power between unions and employers. *See* Cox, *supra* note 171; Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1355-56 (1972).

plaintiffs' attempt to impose a greater duty on the union because of a role the union was able to assume through its success in collective bargaining.[199] However, contrary to another suggestion of the Court,[200] there should also be preemption of a claim alleging that a union inspector with authority secured from the employer had breached the general duty of care owed by all in our society to all others, by, for example, making a mine more dangerous by negligently moving a safety device. As long as the allegedly negligent act was committed while the union agent was using authority obtained from the employer to benefit represented employees,[201] it should be protected from state law in order to insure that negotiations to gain such authority not be chilled.[202]

199. 110 S. Ct. at 1913. The *Rawson* Court therefore did not have to address an issue also avoided expressly by the Court in *Hechler*: whether state law can impose a duty to secure a safe workplace on unions by virtue of their representational capacity rather than because of anything contained in a collective agreement. *See* Electrical Workers v. Hechler, 481 U.S. 851, 862-63 n.5 (1987). In my view, perhaps under a different elaboration of the *Machinists* precedent, the Court should clearly find preempted any such attempt by state law to augment the duty of fair representation imposed on unions by federal law. By burdening unions with extra responsibility, such an augmentation would affect "the balance of power between labor and management expressed in our national labor policy." Teamsters Union v. Morton, 377 U.S. 252, 260 (1964). State laws should not impose such extra responsibility except when authorized by federal law, such as Title VII of the 1964 Civil Rights Act.

One commentator has argued that unions should be liable under the federal duty of fair representation law for failing to secure minimal workplace safety for represented employees. *See* Schmall, *Workplace Safety and the Union's Duty After* Lueck *and* Hechler, 38 KANS. L. REV. 561 (1990). Such a duty, however, would impose yet another burden on today's beleaguered unions, without offering any assistance to the vast majority of American employees who are not represented by unions. Union leaders who wish to use contractual safety guarantees to promote organization are now free to do so, without governmental mandates that would restrict their judgments on how their limited resources could best benefit their membership. *See generally* Harper and Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1211 (1985).

200. 110 S. Ct. at 1913.

201. This doctrine of course would not preclude recovery by an injured employee from a workers' compensation system.

202. This doctrine is applicable outside the workplace safety context. For instance, application of the doctrine would have corrected the mistake made by the Fifth Circuit in not preempting a negligence claim against a union for failing to warn a shipowner of the violent propensity of a worker it referred to a maritime vessel pursuant to its negotiated authority to affect hiring. Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989).

A case might be made, however, that general state tort law against bad faith or malicious infliction of harm ought to be able to be applied to union actions taken pursuant to responsibilities secured through collective bargaining to benefit employees. Such law might not chill the negotiation of union authority because union leaders might be less concerned about the likelihood of it generating successful suits. *Cf.* Farmer v. United Bd. of Carpenters, 430 U.S. 290 (1977) (finding no preemption of intentional infliction of emotional distress action against union for especially abusive operation of union hiring hall authority secured in collective agreements).

The Court in *Farmer* considered whether the tort action before it should be preserved for the primary jurisdiction of the Labor Board because it might concern union activity arguably protected or prohibited by the Act. The Court suggested that even intentional state tort law should be preempted if it threatened to penalize union activity that might be protected by the Labor Act. *Id.* at 300 and n.9. *See also* Association of Journeymen v. Borden, 373 U.S. 690 (1963) (preemption of intentional state tort that might penalize Labor Act-protected operation of union hiring hall). No

V. SOME FURTHER APPLICATIONS

Although the analysis supporting the principles advocated above for considering preemption of the application of minimum state benefit laws to unionized employees may seem complicated, the principles can be simply summarized. First, section 301 law should establish a rebuttable presumption that parties to collective bargaining do not wish to incorporate state law rights and obligations into their agreements. This presumption means that any negotiable right or obligation that state law would create because of something agreed upon in a collective agreement should not be recognized in either federal or state court in the absence of clear evidence that the particular parties to the agreement wanted recognition of the particular right or obligation. Section 301 preemption thus reaches only state law claims that are both dependent upon a collective agreement and are negotiable.

Second, in order to facilitate the collective bargaining encouraged by the federal labor laws, the *Oliver* and *Machinists* precedents should be interpreted to require the preemption of state laws that render nonnegotiable, rights and obligations that could excessively discourage the negotiation of other rights or obligations within the scope of mandatory bargaining. In my discussion of how the *Lueck* and *Metropolitan Life* decisions might be reconciled, I left open how much discouragement should be considered excessive, but I at least suggested that state laws, like that treated in *Lueck*, that offer additional remedial protection to rights created by collective agreements should be preempted.[203]

These principles can be applied without great difficulty even to those state laws that have most challenged the courts in this era of expanding state protection of employees. In the next section of this essay, I wish to further demonstrate the worth of the principles by additional consideration of a series of important issues raised in preemption cases not fully discussed above.

On the one hand, adoption of the approach advocated above would

effort by a union official to make an employee workplace less safe could be even arguably protected by the Labor Act, however.

Nevertheless, the Court's decision last term in Breininger v. Sheet Metal Workers Local No. 6, 493 U.S. 67 (1989), to subject discriminatory hiring hall referrals to duty of fair representation claims highlights the possibility that the Board's asserted jurisdiction over such claims could preempt state law intentional tort actions because of the "arguably prohibited" strain of the Court's *Garmon* preemption doctrine. Any intentional effort by a union official to harm some represented employees by diluting their employment benefits could arguably be an unfair labor practice under a broad interpretation of sections 8(b)(1)(A) and 8(b)(2) of the Act. However, the Court has refused to preempt federal duty of fair representation court actions merely because the Board has asserted concurrent jurisdiction. Vaca v. Sipes, 386 U.S. 171, 180-83 (1967).

203. *See supra* notes 183-89 and accompanying text.

clarify that state law claims should not be preempted merely because their resolution may at some point require the interpretation of a collective agreement. This is true for cases like *Jackson*[204] where a defendant argues that the collective agreement must be interpreted to determine whether a union has effectively waived the state law right or obligation on which a plaintiff relies. It is also even more clearly true for cases in which a defendant argues that a collective agreement defines a legitimate motive for a personnel decision challenged as tainted by some consideration illegitimate under state law. For instance, a defendant may contend that a collective agreement's authorization of discharge for a particular rule infraction innocently explains the termination of an employee who has invoked a state wrongful discharge law that condemns retaliation for filing a workers' compensation claim. Preemption is not warranted in such a case because the state law right is not in any way dependent upon the existence of the rule relied upon by the defendant employer. Indeed, regardless of the meaning of the rule and whether it would have warranted the employee's discharge, state law could condemn the discharge as being in fact motivated by the filing of the workers' compensation claim.[205]

Perhaps less obviously, preemption also is not warranted when the defendant claims that the collective agreement defines a benefit, such as seniority, that the plaintiff claims has been denied him for discriminatory reasons proscribed by state law. In such a case, interpretation of the meaning of the collective agreement may be central to plaintiff's claim of discrimination.[206] Preemption is nonetheless not appropriate if the state law's condemnation of discrimination is wholly independent of the agree-

204. *See supra* notes 95-115 and accompanying text.

205. Not surprisingly, therefore, courts in the post-*Lingle* era have rejected arguments for preemption in this kind of case. *See, e.g.*, Marshall v. TRW Inc., 900 F.2d 1517 (10th cir. 1990); Nelson v. Central Illinois Light Co., 878 F.2d 198 (7th Cir. 1989); Bettis v. Oscar Mayer Food Corp., 878 F.2d 192 (7th Cir. 1989). Professor White, however, claims that had the employer in *Lingle* asserted that it discharged Lingle for violating a clause in the collective agreement, her claim would have been preempted. White, *supra* note 76, at 113. For reasons given in the text, I am certain that this is incorrect even under the *Lingle* test. If it were correct, however, the implications of *Lingle* would be even more troublesome. Any retaliatory discharge claim from a union employee could be eliminated by the assertion that the employee had violated a valid work rule, without giving the employee a chance to challenge that assertion.

206. Also not surprisingly, therefore, post-*Lingle* courts have had difficulty with this kind of case. *See, e.g.*, McCall v. Chesapeake & Ohio Ry. Co., 844 F.2d 294, 304 (6th Cir. 1988) (preemption because collective bargaining agreement must be interpreted to determine whether plaintiff's handicap is unrelated to job plaintiff claims); Cuffe v. General Motors Corp., 180 Mich. App. 394, 446 N.W.2d 903 (Mich. Ct. App. 1989) (preemption because plaintiff claims discriminatory denial of seniority due to his handicap). *But see* Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir 1989) (no preemption although collective agreement defines right to reinstatement after disability leave that plaintiff claims was denied because of his handicap).

ment. The state court can interpret the agreement for purposes of judging discriminatory motivation[207] without worrying employers that their collective agreements could expand their legal obligations.[208]

On the other hand, there is a clear range of state law claims that should be preempted under the doctrine that I have attempted to tease out of the *Lueck* decision. Any claim under state law that attempts to supplement the protection given some right or obligation established by a collective agreement should be subject to a presumption of preemption under section 301 if negotiable, or preempted under the *Oliver-Machinists* precedent if not. For instance, last year the Sixth Circuit correctly preempted a claim of bad faith processing of a reinstatement request pursuant to a right to reinstatement secured in a collective agreement.[209] Similarly, the Ninth Circuit appropriately found preempted state law claims for wrongful withholding of wages and for wrongful death caused by a discharge that the plaintiff could question only under the terms of a collective agreement.[210]

However, in a rare case incorrectly declining to preempt, the Seventh Circuit permitted a state law retaliatory discharge claim based on allegations that plaintiffs had not been recalled from lay off in retaliation for their filing suits based on their collective agreement.[211] Under my

207. In doing so the state court could use any relevant section 301 law, though it is worth noting that the source of law for the state courts is effectively not an issue because federal law has never been developed for the interpretation of specific benefit clauses.

208. It might be argued that state discrimination laws are within the class of nonnegotiable conditional laws that might be subject to preemption under a broad interpretation of the *Oliver-Machinists* precedent; such laws do require that a benefit given to individuals outside a protected status group also be given to those within the status group and thus may make more expensive the provision of that benefit. However as noted above, *supra* note 185, the employment status discrimination laws passed by Congress clearly anticipate supplementary state regulation.

209. Terwilliger v. Greyhound Lines, Inc., 882 F.2d 1033 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2204 (1990).

210. Shane v. Greyhound Lines Inc., 868 F.2d 1057, 1063-64 (9th Cir. 1989). The plaintiff also had claimed that his discharge violated the National Labor Relations Act and the public policy of the state of Washington. But the Court found the first claim to be within the primary jurisdiction of the National Labor Relations Board, *id.* at 1060-61, and the second claim to be inadequately pleaded, *id.* at 1062.

See also Deford v. Soo Line R.R. Co., 867 F.2d 1080 (8th Cir. 1989); Gendron v. Chicago & Northwestern Transp., 190 Ill. App. 3d 301, 546 N.E.2d 721 (Ill. App. Ct. 1989) (both finding preempted state fraudulent conveyance law claims to protect benefits secured by collective agreement).

211. Pantoja v. Texas Gas and Transmission Corp., 890 F.2d 955 (7th Cir. 1989). This case might also have been preempted because it falls within the primary jurisdiction of the National Labor Relations Board. *See, e.g.*, Altex Ready Mixed Concrete Corp. v. NLRB, 542 F.2d 295, 297 (5th Cir. 1976) ("filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith"). The employees filed their first law suit together. In any event under its *Interboro* doctrine, the Board may find an employee's assertion of rights secured by a collective agreement to be concerted and protected from discrimination. *See* NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984). The plaintiffs thus might have had a

interpretation of *Lueck*, the Seventh Circuit conclusion that interpretation of the agreement was not necessary to resolve plaintiffs' claim should not have been determinative. The state tort law invoked in this case, like the laws invoked in the other two cases, purported to offer expanded protection to rights established by collective bargaining; application of these laws would thereby render negotiable rights more expensive and more difficult to obtain. Such expanded protection should be afforded only if it is part of the bargain struck in negotiation of the collective agreement.

The doctrine drawn here from the *Lueck* decision also should resolve preemption issues in the broad range of wrongful discharge claims that have proliferated in state courts in the past decade and a half. On the one hand, there should be preemption of any wrongful discharge claim that seeks a remedy provided by state law for the violation of some duty of fair treatment imposed by a collective agreement. For instance, a grievant should not be able to seek state remedies for his employer's breach of a covenant of good faith that the grievant claims is implied by a collective agreement.[212] Nor should a grievant be able to maintain that state law draws from employer actions required to be taken by a collective agreement some additional enforceable contractual commitment against discharge. For instance, an employee should not be able to leverage duties assumed in a collective agreement by using an implied covenant-of-good-faith theory against an employer for its failure to provide the same processes given other employees in grievance arbitration.

On the other hand, there should be no preemption of any action that can proceed without reference either to rights secured by a collective agreement or obligations imposed by such an agreement. Several types of wrongful discharge actions therefore should not be preempted. This is most clearly true for what have been classified as "public policy" wrongful discharge actions, including but not limited to anti-retaliation claims like that made in *Lingle*. Such actions are to serve the integrity of state law or some other general state interest, such as public participation in juries or in law enforcement. Since state law does not condition the availability of such actions on the existence of any contractual relationship between employee claimants and their employer, permitting them to proceed cannot possibly inhibit the negotiation of collective agreements.

However, even some state law wrongful discharge actions designed

remedy through the Board, as well as through a complaint under the collective agreement and a potential duty of fair representation case.

212. *See, e.g.*, Newberry v. Pacific Racing Ass'n, 854 F.2d 1142 (9th Cir. 1988); Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987) (decisions preempting such claims).

to protect contractual relationships between employers and their employees may not be dependent upon rights or obligations established in collective agreements. For instance, either through judicial transformation of the employment-at-will presumption or through legislation, a state might impose a legal obligation on employers, whether or not unionized, not to discharge without good cause employees who have worked for some minimum time period. A state might do so by presuming that employers make a commitment of fair treatment at termination to their nonprobationary or at least long-term employees.[213] Claims by employees covered by collective agreements that such a general legal obligation has been breached should not be preempted. No more than public policy actions would they inhibit bargaining of some job security protection in collective agreements. Indeed, permitting such claims might even encourage the negotiation of such protection because they provide an extra incentive for employers to find a lower-cost alternative for the resolution of termination grievances.[214]

For the reasons given above in the discussion of the *Jackson* case, it should not make a difference if the state law makes the employer's presumed obligation reversible by a collective agreement. The fact that the state court will have to consider the collective agreement to determine whether the state law standards on waiver have been met does not threaten the collective bargaining process protected by federal law.[215] Preemption should instead turn only on whether the grievant's case depends on the invocation of some employer commitment embodied in the collective agreement or upon a course of conduct taken by the employer pursuant to obligations assumed in the agreement.

A somewhat more complicated analysis is required for state law actions by unionized employees based on claims that employers have made

213. Montana has effectively codified such a presumption. *See* Montana Wrongful Discharge From Employment Act of 1987, MONT. CODE ANN. §§ 39-2-901 to -914. The California common law also seemed to be approaching this position, *see* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), but the California Supreme Court's decision in Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), to tie the covenant of good faith action to contract seems to step back from any presumption that is independent of some kind of actual promise, however implicit.

214. *See supra* note 89 and accompanying text.

215. A state law that provides some independent job security guarantee of course might also reasonably presume that any collective bargaining agreement is intended to waive the guarantee. Thus, the Ninth Circuit's leading decision in Young v. Anthony Fish Grottos, 830 F.2d 993 (9th Cir. 1987), sensibly interpreted California's covenant of good faith and fair dealing as not to extending to probationary employees under a collective agreement. However, the court should have rested on this interpretation of California law, rather than on finding that law preempted by federal law. *Young* has spawned a line of cases inviting the same criticism. *See, e.g.*, Jackson v. Southern California Gas Co., 881 F.2d 638, 644-45 (9th Cir. 1989); Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1286 (9th Cir. 1989).

special, additional contractual commitments of job security separate from any collective agreement. *Caterpillar v. Williams*[216] involved such a claim. The plaintiffs in that case relied upon promises allegedly made to them by their employer when they were not members of the bargaining unit covered by the collective agreement.[217] However, the *Williams* Court made clear that its holding that the claims were not "completely" preempted and thus not removable to federal court would be the same even if the "individual employment contracts were negotiated . . . *while* the [employees] were covered by a collective agreement . . . ."[218] The Court acknowledged the employer's arguments that the individual contractual actions were preempted by the NLRA because of the exclusive representational status of the union and that the collective bargaining agreement should be read to waive rights under any individual contracts covering bargaining unit employees; but it concluded that these arguments did not warrant removal and should be first addressed by the state court.[219]

The arguments left for state court consideration were not frivolous. Consider first the argument that a collective bargaining agreement should be read to waive any rights established by individual contracts. Collective bargaining agents clearly have more authority to compromise or waive rights established in private employment contracts than allowed them under *Metropolitan Life* to compromise or waive employee rights established by state public law. In *J.I. Case v. NLRB*, the Court explained that if the majority of employees in an appropriate bargaining unit "collectivizes the employment bargain, individual [contractual] advantages or favors will generally in practice go in as a contribution to the

216. 482 U.S. 386 (1987). *See supra* notes 140-46 and accompanying text.

217. *Id.* at 388-89. *See also* Berda v. CBS Inc., 881 F.2d 20 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 879 (1990) (holding no section 301 preemption of state action premised on pre-employment agreement advantageous to employee). *Cf.* Kidd v. Southwest Airlines, Co., 891 F.2d 540 (5th Cir. 1990) (holding extra-unit employee's claim not preempted simply because her individual contract was modeled after collective agreement).

218. 482 U.S. at 398, n.12 (emphasis in original). *But see* Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337 (8th Cir. 1989) (enforcement of individual side contract for tuition payment preempted in part because collective agreement must be interpreted to determine whether the side contract is more favorable to employee); Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283 (9th Cir. 1989) (preemption because employee was covered by collective agreement that prohibited individual contracts); DeLapp v. Continental Can Co. Inc., 868 F.2d 1073 (9th Cir. 1989) (preemption because employee was covered by collective agreement and relied on promise from employer not to enforce a term of agreement); Darden v. U.S. Steel Corp., 830 F.2d 1116 (11th Cir. 1987) (*Williams* distinguished because employees were members of bargaining unit when independent implied oral contracts were made); Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987) (*Williams* distinguished on same grounds).

219. 482 U.S. at 397-99 and n.13.

collective result."[220] This suggests that exclusive bargaining agents have authority to trade for the collective good any contractual advantages that have been secured by individual members of the bargaining unit. Furthermore, if this authority exists, any determination of whether it has been used arguably should be governed by the federal law that creates it, rather than the state law that secures the individual contractual rights. Section 301 law, in other words, should determine whether individual contract actions can proceed in the face of a collective agreement.

This argument does not, however, adequately support a section 301 presumption of preemption of all state law actions based on individual contracts brought by employees covered by a collective agreement. In the first place, unions seem not to have the authority to waive all state law claims that represented employees might base on independent contracts. As the *Williams* Court stressed, even the *J.I. Case* decision reserved whether individual contracts might add to the collective bargain under some circumstances.[221] Moreover, unqualified union authority to waive independent contractual rights would be inconsistent with the Court's 1983 decision in *Belknap v. Hale*.[222] The *Belknap* Court held that strike replacements could sue an employer for damages deriving from its breach of a commitment to protect their jobs from the claims of returning strikers, even though fulfillment of the commitment would have been inconsistent with a strike settlement agreement subsequently negotiated with an exclusive bargaining representative. The Court did not decide whether the replacements could obtain specific performance of the employer's independent commitment, but it did conclude that a damage action was not preempted.[223]

Second, there is no good reason to establish a presumption under section 301 law that collective bargaining agreements are intended to waive any independent contractual rights that are within the authority of unions to waive. Such a presumption does not make sense as a default rule. It does not express the probable intent of a union that has not expressly waived independent contractual rights.[224] Unions often would want to retain advantages groups of employees have secured on their own; such advantages could act as chips for future negotiations. Moreover, there is no reason to penalize employees for their representative's

220. 321 U.S. 332, 339 (1944).

221. 482 U.S. at 396 (quoting 321 U.S. at 339).

222. 463 U.S. 491 (1983).

223. *Id.* at 506-07. The *Belknap* Court even found some (questionable) support for its conclusion in some qualifications in the *J.I. Case* opinion. *Id.*

224. *Cf. supra* note 47 and accompanying text.

failure to make a contract explicit on this waiver issue; employers, not unions, have more information on side contracts that might affect the total industrial relations systems that they are negotiating.[225] Finally, no general goal of labor law, such as industrial peace, would be served by applying a presumption of waiver here.[226]

Consider next the argument raised in *Williams* that the NLRA should preempt the enforcement of at least any independent contractual commitment given by an employer in breach of its duty to deal only with an exclusive bargaining representative concerning the terms and conditions of employment of represented employees. Making promises to represented employees without the consent of their exclusive bargaining representative does[227] and should constitute an unfair labor practice.[228] Unions therefore should be able to seek whatever remedies from the Labor Board that are necessary and appropriate to prevent such undermining of their status, including the prospective voiding of commitments already made.[229]

However, allowing states to enforce such commitments before the Board has held them invalid neither deprives the Board of jurisdiction to consider later unfair labor practice charges, nor encourages further circumvention of bargaining agents. The issues in an unfair labor practice adjudication would be totally different than those in a contract enforcement case.[230] Moreover, permitting employers to evade commitments

225. *Cf. supra* notes 57-58 and accompanying text.

226. *Cf. supra* notes 60-63 and accompanying text. It is true that independent contracts that afford certain individuals advantages could engender resentments in the bargaining unit. So might the implied revocation of such contracts, however. Unions negotiating collective agreements should have unrestricted authority to balance such possibilities, and such balancing would not be facilitated by a presumption that encouraged employers to not disclose full information about what separate agreements exist.

227. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944).

228. As explained in *J.I. Case*, even promises of advantages to individuals "are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and creates the suspicion of being paid at the long-range expense of the group as a whole." 321 U.S. at 338-39.

229. It is important to note that the Board's remedy for an illegal unilateral grant of enhanced benefits to represented employees does not include an automatic cancelation of the benefits. Instead the Board cancels the benefits only if requested to do so by the union whose authority has been undermined. *See, e.g.*, Taft Broadcasting Co., 264 N.L.R.B. 28 (1982); Kendall College, 228 N.L.R.B. 126 (1977).

The Board has not made retroactive any abrogation of an individual commitment made in violation of the Labor Act. An innocent employee thus can obtain enhanced benefits, such as higher wages, for that period during which the commitment was in effect. Moreover, in Belknap v. Hale, 463 U.S. at 510-12, the Court suggested that the Board should not "immunize" an employer "from responding in damages" for breach of a contract made as "part and parcel" of an unfair labor practice.

230. *Cf.* Belknap v. Hale, 463 U.S. at 510-11; Windfield v. Groen Division, Dover Corp., 890

with individual employees by invoking preemption doctrine might even encourage circumvention of bargaining agents. It might inspire employers who hope to reap the benefits of giving special deals to favored employees, including dividing them from their bargaining unit or union representative, without being forced ultimately to pay the costs if a change of circumstances causes the special deal to no longer seem attractive. Employees who have been given special promises by their employer will not necessarily look more favorably on their exclusive representative if that representative's status has the legal effect of denying them benefits on which they relied. Only unions protected by section 8(a)(5) of the Labor Act should be able to use its force to secure their status; employers who may be guilty of the section's violation should not be able to use it as a shield against individual employees asserting contractual commitments.[231]

In sum, state law claims based on contractual commitments that have been made independent of obligations imposed by a collective agreement should not be subject to any presumptions of preemption,[232] regardless of whether those commitments were made pursuant to an illegal circumvention of an exclusive representative. Actions seeking remedies that are inconsistent with a Board remedial order or with the terms of a collective agreement should be precluded; but any additional compromise of state law contractual rights should at least turn on the finding of union intent to trade these rights for the collective good of the unit.[233]

F.2d 764 (5th Cir. 1989) (no preemption of employee action to enforce promise of job security arguably an unfair labor practice because made during certification election to influence employee votes).

231. Forcing employers to incur the costs of inconsistent legal obligations of their own making is consistent not only with *Belknap*, and the Board's practice of refusing to void increased benefits promised as part of unfair labor practices unless requested to do so by the union, *see supra* note 229, but also with W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983) (enforcing arbitration award of back pay for layoffs inconsistent with collective agreement but consistent with Title VII conciliation agreement then in effect).

232. Of course, as the Court stressed in *Lueck*, 471 U.S. at 214-15, collective bargaining agreements may impose duties beyond those expressly recited. Moreover, these duties may include a consistent application of work place rules developed as the "industrial common law" praised in the Trilogy, *see Warrior & Gulf*, 363 U.S. at 581-82. The Sixth Circuit in Ulrich v. Goodyear Tire & Rubber Co., 884 F.2d 936 (6th Cir. 1989), thus correctly found a state law contractual action preempted if that action relied on the common practices of a workplace governed by a collective agreement. However, the *Ulrich* court was incorrect if the action could rely only upon an independent promise of the employer that the complainants could return to bargaining unit work.

233. Even a state law action based on implied commitments made in an employee handbook or personnel manual should not be preempted unless the manual is based on commitments made in collective bargaining to the union. *But see* Dirks v. Sioux Valley Empire Electric Ass'n, 450 N.W.2d 426 (S.D. 1990) (preemption necessary under *Lingle* because manual defers to other contracts, including collective agreement). However, state law holding employers to implied promises in employee manuals—like state law on implied in law good faith covenants, *cf. supra* note 215—might reasonably be interpreted not to extend to employees covered by a collective agreement. *See* Shivers v. Saginaw Transit System, 719 F. Supp. 599 (E.D. Mich. 1989) (so interpreting Michigan law).

For similar reasons state law fraud or misrepresentation claims generally should not be preempted even if they allege the misrepresentation of terms or conditions of employment that were the subject of mandatory bargaining under the Labor Act. A plaintiff may well be able to prove a false representation of a decision already made to deny him promised benefits without analysis of whether those benefits were due him under a collective agreement.[234] But even the need to interpret a collective agreement to prove an intentional fraudulent inducement to work should not require preemption.[235] Fraud claimants seek damages for their employers' misrepresentation of what an agreement contains, not for their failure to fulfill an obligation created by the agreement. The negotiation of obligations under collective agreements cannot be inhibited by such claims. This is true whether or not a claimant is covered by the collective agreement at the time of the alleged misrepresentation.[236]

Misrepresentation claims, like other state law tort claims, should only be preempted when they threaten to augment the costs of obligations assumed through collective bargaining. This would be the case if the alleged misrepresentations were contained in the agreement itself or in some course of conduct required by the agreement. For instance, if an employer agreed with a union to explain to represented employees some benefits available to those employees, the employer's explanations should be protected from attack under state misrepresentation law. Rendering them vulnerable to attack would increase the potential cost of the obligation to explain and thus might inhibit negotiation of that obligation. Application of a state misrepresentation tort in this case would be equivalent to application of the bad faith insurance-administration tort in *Lueck*. It therefore should be preempted under the *Oliver-Machinists* precedent even if an employer's duty not to make fraudulent misrepresentations is not negotiable under state law. However, if an employer unilaterally

234. *See* Wells v. General Motors Corp., 881 F.2d 166, 173 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1959 (1990); Berda v. CBS Inc., 881 F.2d 20, 27 (3rd Cir. 1989); Varnum v. Nu-Car Carriers, Inc., 804 F.2d 638, 640 (11th Cir. 1986); Anderson v. Ford Motor Co., 803 F.2d 953, 955-59 (8th Cir. 1986).

235. *But see* Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 1001 (9th Cir. 1987).

236. *See* Wells v. General Motors Corp., 881 F.2d 166, *cert. denied*, 110 S. Ct. 1959 (1990). *But see* Darden v. United States Steel Corp., 830 F.2d 1116, 1119-20 (11th Cir. 1987) (preempting a misrepresentation claim based on this distinction).

It may be that a misrepresentation to an employee covered by a collective agreement could be part of an employer's circumvention of an exclusive bargaining agent in violation of the Labor Act. Yet *Belknap* also involved a misrepresentation claim by the strike replacements, and the Court found the claim not to threaten the primary jurisdiction of the Labor Board because its adjudication would not address issues central to any unfair labor practice charge. 463 U.S. at 510-11. It was thus unnecessary for the *Wells* court to argue that the employer defendant committed no unfair labor practice. 881 F.2d at 169-71.

elects to explain collectively bargained benefits, there is no need to protect any misrepresentations in the explanation from the force of state law.

The line drawn in the last paragraph is similar to that appropriately drawn by the Ninth Circuit in consideration of the preemption of employee defamation claims against employers. This court has held that preemption is appropriate if and only if the statements that are allegedly defamatory are required to be made by a collective agreement.[237] This is correct not because the defamation claim requires the interpretation of the collective agreement and therefore an application of section 301 law; but rather because the risk of a defamation claim could interfere with collective bargaining by deterring an employer from agreeing to union proposals to grant to employees generally beneficial processes, such as prompt notice of charges against them.[238] Employer acceptance even of a grievance arbitration system could be discouraged if fulfillment of the requirements of that system could result in a defamation suit.[239] However, if an employer unilaterally elects to make accusations or negative statements about an employee that are not required by an agreement with a collective bargaining agent, federal labor law has no concern with defamation claims against those statements.

Finally, the preemption principles advocated in this essay can explain how courts should treat the frequent claims that intentional infliction of emotional distress actions brought by unionized employees should be preempted. If plaintiffs allege that an employer has intentionally harmed them by an outrageous failure to comport with standards of conduct established either in a collective agreement or in the implementation of an industrial relations system governed by the agreement, their action should be preempted. Using standards developed by a particular employer bilaterally with a collective bargaining agent to judge that em-

237. *Compare* Tellez v. Pacific Gas and Elec. Co., 817 F.2d 536 (9th Cir. 1987). *cert. denied*, 484 U.S. 908 (1987) *with* Shane v. Greyhound Lines, 868 F.2d 1057, 1063 (9th Cir. 1989) (claim based on discharge notice required by collective agreement must be preempted). *See also* Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981) (federal law provides absolute privilege for statements in grievance proceedings). *But see* Thompson v. Public Serv. Co., 135 LRRM 2919 (Colo. 1990) (qualified privilege sufficient to avoid preemption).

238. A collective agreement could of course incorporate state defamation law that would otherwise be preempted, perhaps with a qualifying privilege, just as collective agreements could incorporate any other state law that should be presumptively preempted because of the possibility of discouragement of collective bargaining.

239. This basis for the Ninth Circuit's position should not be precluded by the Supreme Court's decision in Linn v. United Plant Guard Workers, 383 U.S. 53 (1966). *Linn* held that state law actions for malicious defamation by union organizers were not preempted by the NLRA. For reasons given in Justice Fortas' compelling dissent, *id.* at 69-74, *Linn* was probably wrongly decided. In any event, since it did not involve statements made in collectively bargained processes, it did not implicate the concern addressed in the text.

ployer's behavior under state law could discourage the bilateral negotiation of more stringent standards of potential benefit to employees. There should also be preemption of any claim that an employer has intentionally inflicted emotional distress by some outrageous or unreasonable implementation of a grievance-arbitration system or other processes expressly or implicitly required by a collective agreement.[240] Permitting such claims against the implementation of agreed-upon processes, like permitting misrepresentation or defamation claims against such implementation, could also increase the difficulty of establishing an employer's duties to provide potentially beneficial processes.

However, employees should be able to use any available state law standards of outrageousness or unreasonableness that would be applied to nonunion employers to attack a unionized employer's conduct not in discharge of bilaterally established duties. A state law action that depends in no way on the existence of such duties cannot discourage their negotiation. Contrary to law established in the Ninth Circuit[241] and accepted by several other courts as well,[242] the possibility that the collective agreement was intended to modify any state law right to reasonable conduct by providing different standards of reasonableness should not constitute a sufficient basis for preemption. As explained above in the discussion of the *Jackson* drug testing case,[243] an employer's contention that a collective agreement has compromised a state law right should never be the basis for the preemption of claims based on that right. State law should determine whether a right it creates independent of a private contract should be negotiable, and if so, how it might be modified. And any limits placed by state law on the negotiability of a right that is not conditioned on an employer's provision of some other right, is not preempted by federal law under the *Oliver-Machinists* precedent.[244]

240. Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1063 (9th Cir. 1989) and Detomaso v. Pan Am Airways, 43 Ca. 2d 517, 733 P.2d 614, 235 Cal. Rptr. 292 (1987) may provide examples.

241. *See, e.g.*, Edelman v. Western Airlines, Inc., 892 F.2d 839 (9th Cir. 1989); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142 (9th Cir. 1988); Miller v. AT & T Network Systems, 850 F.2d 543 (9th Cir. 1988); Hyles v. Mensing, 849 F.2d 1213, 1216 (9th Cir. 1988). *But see* Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991).

242. *See, e.g.*, McCormick v. AT & T Technologies, Inc., 934 F.2d 531 (4th Cir. 1991); Johnson v. Beatrice Foods, 921 F.2d 1015 (10th Cir. 1990); Brown v. Southwestern Bell Tel. Co., 901 F. 2d 1250 (5th Cir. 1990); Beard v. Carrollton R.R., 893 F.2d 117 (6th Cir. 1989); Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989); Knafel v. Pepsi Cola Bottlers of Akron, Inc., 850 F.2d 1155 (6th Cir. 1988); Humphreys v. Pie Nationwide Inc., 723 F. Supp. 780 (N.D. Ga. 1989). *But see* Hanks v. General Motors Corp., 906 F.2d 341 (8th Cir. 1990); Krashua v. Oliver Realty, Inc., 895 F.2d 111 (3d Cir. 1990); O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989); Keehr v. Consolidated Freightways, Inc., 825 F.2d 133 (7th Cir. 1987) (all appropriately finding no preemption).

243. *See supra* notes 95-115 and accompanying text.

244. *See supra* notes 167-75 and accompanying text.

Consider, for instance, the leading Ninth Circuit case, *Miller v. AT & T Network Systems*.[245] Daryl Miller alleged that although AT & T was aware that high heat affected his heart beat and caused him to lose consciousness, it persisted in assigning him to work in Mesa, Arizona in over ninety degree weather, subjecting him to further fainting spells. Miller apparently did not base his intentional infliction of emotional distress claim on any standard of behavior required by the collective agreement. However, the Ninth Circuit held that his claim must be preempted because in its view the governing Oregon state law would permit the agreement to define whether Miller's job assignments were socially tolerable, regardless of whether these assignments would have been acceptable in the absence of the agreement. The court indicated that only emotional distress claims resting on state law that provides mandatory (*i.e.*, nonnegotiable) as well as independent standards of acceptable behavior can escape preemption.[246]

This holding means that Miller had to forfeit a right of action that he might have enjoyed had he not been "protected" by a collective agreement, not because the collective agreement has been interpreted to qualify or waive that right, but rather because it *might* be so interpreted.[247] Worse, Miller is offered no channel to determine whether the collective agreement was in fact intended to modify a state right, rather than just not to create any additional private law right. As explained above,[248] absolutely no federal labor law policy expressed in the development of uniform section 301 law, or in other labor law preemption doctrine, requires this perverse result. Like the drug testing cases represented by the *Jackson* decision, intentional infliction of emotional distress cases like *Miller* illustrate well why the section 301 preemption law articulated in *Lingle* must be clarified.

VI. Some Concluding Thoughts on Overlapping Rights and Remedies

I recognize that the clarifying restriction of section 301 preemption advocated in this essay, even when supplemented with a partial reinvigoration of the *Oliver* precedent, exposes employers to the potential of more multiple attacks in multiple fora against the same challenged conduct. I

245. 850 F.2d 543 (9th Cir. 1988).

246. *Id.* at 550-51 and n.5.

247. *See also* Douglas v. American Information Technologies Corp., 877 F.2d 565, 572 n.10 (7th Cir. 1989) (preemption if right of action is "arguably sanctioned" by labor contract).

248. *See supra* notes 106-15 and accompanying text.

also appreciate that employers can argue that efficient and fair employment regulation requires the avoidance of such duplication.

Such arguments, however, should be made to state courts and legislatures fashioning minimum employment rights, and to unions negotiating arbitration clauses, not to state and federal courts applying federal labor law preemption doctrine. As the Court in both *Lingle* and *Metropolitan Life* recognized, there is nothing in federal labor law that prevents a state from attempting to address the same perceived flaws in unregulated employment relationships that might be addressed through collective bargaining. Duplication in part results from the plural sources of enforceable obligations in our public-private federal legal system.[249] Furthermore, the provision of multiple actions may be quite rational for policymakers hoping to ensure more certain elimination of particular employment practices, and perhaps convinced that regulatory underenforcement is more likely or at least more costly than regulatory overenforcement.[250]

Employers nonetheless should be able to avoid exposure to multiple actions against the same conduct by convincing either state lawmaking bodies or unions that duplicative protection of employees is not necessary. Note first how an employer might avoid duplicative litigation through collective bargaining. Federal labor law must protect the authority of employers and unions to condition access to an arbitration system of their own creation on a grievant's willingness to waive any state law cause of action arising from the same circumstances. This must be true even for state actions to protect nonnegotiable and unconditional state law rights that cannot be preempted by federal labor law. It is conceivable that state law would condemn any denial of a generally available arbitration remedy to employees who refuse to sacrifice a nonnegotiable state right as retaliation for the assertion of such a right. But federal law, under the *Oliver-Machinists* precedent, could supercede such a condemnation as an unacceptable discouragement of the negotiation of arbitration systems. Denying access to an arbitration system to those employees who retain an alternative remedy under state law can be defended as a

249. *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 54 (1974) (the lower courts "reasoned that to permit an employee to have his claim considered in both the arbitral and judicial forums would be unfair since this would mean that the employer, but not the employee, was bound by the arbitral award . . . . But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process.").

250. *See* S. ESTREICHER & M. HARPER, THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP, 883-84 (West 1990).

rational allocation of a privately negotiated costly employee benefit.[251]

Consider further how state lawmaking bodies might integrate the rights or remedies they create with those that might be provided in collective agreements. One option would be to deny the state law remedy to those employees with a significant alternative remedy under a collective bargaining agreement.[252] This option might be challenged under the *Oliver-Machinists* precedent as a discouragement of the negotiation of the benefit of an arbitration remedy. If the state law provides a more attractive remedy than would arbitration, unions might insist that any arbitration clause exclude employees who might claim the state law remedy. However, this is not the type of impact on collective bargaining that federal labor law should preclude. Unlike the antitrust prohibition struck down in *Oliver* or the tort action preempted in *Lueck*, this option would not impede unions obtaining a benefit that they determine would enhance the situation of represented employees. It would only make it less likely that unions would view arbitration as such a benefit in all circumstances; it would encourage, not discourage employers agreeing to arbitration. Federal labor laws framed to facilitate collective employee choice of enhanced benefits should not be read to prevent state law from giving unions the option of choosing between a minimum statutory benefit and a collectively bargained alternative.[253] This conclusion, moreover, is sup-

251. For this reason even federal minimum employee rights legislation containing antiretaliation provisions, such as that embodied in Title VII of the 1964 Civil Rights Act, *see* 42 U.S.C. § 2000e-3(a) (anti-retaliation clause), also should not condemn collective bargaining agreements that force grievants to choose between statutory and contractual remedies. There is nothing in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), to the contrary. In that case the Court did reiterate that individual employees cannot be forced to waive statutory rights as a condition for the utilization of other rights secured in a collective agreement free of such a condition. *Id.* at 51-52. However, both the Court's language and its citation of J.I. Case v. NLRB, 321 U.S. 332 (1944), make clear that its concern was detracting from collective bargaining, not the qualification of a contractual right negotiated through such bargaining.

Unions must be concerned that they do not breach their duty of fair representation through special treatment of any group of employees that might be protected by independent statutes. However, allocating scarce arbitration resources only to those who do not have or elect not to use an alternative statutory remedy should be sufficiently rational and benign to sustain a fair representation challenge, even accepting the active antidiscrimination role apparently envisioned for unions by the Court in Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (Title VII condemns union's refusal to file discrimination grievances because of fear of employer reaction).

252. State law could judge the adequacy of any remedy under the collective agreement. The state would not have to defer to federal law because it would not be using the collective agreement to augment any obligations that an employer would have under state law in the absence of the agreement. Even a state right that could not be claimed if an employee's grievance was "arbitrable" under a collective agreement would not have to be applied in accordance with the *Warrior & Gulf* presumption of substantive arbitrability. The state would probably want to apply this section 301 presumption, but there is no reason why it should have to if it wished to give a broader or narrower scope to the right it has created.

253. Federal law, however, might conceivably require any denial of a state law remedy to be dependent upon a clear and unequivocal statement in the collective agreement that reflects the

ported by the Court's decision in *Fort Halifax Packing Co. v. Coyne*[254] not to preempt a Maine law requiring a minimum level of severance payments to employees laid off because of a plant closing only in the absence of a contract providing for severance pay.[255]

A second option would be to require employees with access to a collectively bargained grievance arbitration system to exhaust that system and to accept any factual determinations it makes before attempting any state law claim.[256] If this option only makes an employee's assertion of a state remedy more difficult it no more conflicts with the goals of federal law than does the first option. It is simply another way to require the union to choose between complete protection by state processes and protection through the arbitral system.[257]

A strong *Oliver-Machinists* challenge might be made to a third more radical option for the integration of state law remedies with those that might derive from collective bargaining—the state's absolute denial of its right or remedy to any union-represented employee or at least any employee covered by a collective bargaining agreement.[258] This option would prevent a union from choosing state law rights and remedies as preferable to those that it could negotiate in a private agreement. By thereby penalizing employees for their choice of union representation,

union's recognition of its waiver of the state law remedy. The purpose of such a law would be to protect collective negotiations from the burden of unions being worried about the unintentional waiver of state law-created employee rights. *See supra* note 109.

254. 482 U.S. 1, 19-22 (1987).

255. *See id.* at 22 ("The fact that the parties are free to devise their own severance pay arrangements, however, strengthens the case that the statute works no intrusion on collective bargaining .... If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, see Metropolitan Life, surely one that permits such bargaining cannot be pre-empted").

A fortiori, there should be no preemption of the more common state statutory provisions that provide minimum protections or benefits to employees, but allow collective bargaining agreements to provide more generous protections or benefits. *See, e.g.*, WIS. STAT. ANN. § 111.91(2)(f) (West 1989 Supp.) ("Nothing in this paragraph prohibits the employer from bargaining on rights to family leave or medical leave which are more generous to the employee ...."); ME. REV. STAT. ANN. 26 § 681 (Supp. 1989) (permitting greater protection from substance abuse testing); MASS. GEN. L. ch. 175 § 1106 (1988) (permitting collective agreement to require longer continuation of health insurance after plant closing).

256. For instance, in Childers v. Chesapeake & Potomac Telephone Co., 881 F.2d 1259 (4th Cir. 1989), the Fourth Circuit interpreted Maryland law to require a grievant seeking damages for a retaliatory discharge for filing a workers' compensation claim to first prevail in an arbitration proceeding under the collective agreement governing his bargaining unit.

257. However, if the state permits an arbitral finding to be used against an employer as well as against an employee grievant, it may make the arbitral process more expensive for employers and thereby discourage its negotiation. Such discouragement should be grounds for preemption under the *Oliver-Machinists* precedent.

258. This option was elected in the Montana Wrongful Discharge From Employment Act of 1987, MONT. CODE ANN. §§ 39-2-901 to 914. This Act "does not apply to a discharge ... of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term." *Id.* at § 39-2-912.

this approach could discourage that choice and any collective bargaining which it could support.[259]

Yet I am not convinced that this approach should necessarily be preempted by federal law. First, collective bargaining arguably could be encouraged as much by the decrease in employer resistance to unionization that might follow upon exempting union employees from state law, as it would be directly discouraged by such exemptions.[260] More importantly, states might have strong reasons for not extending certain rights and remedies to employees represented by collective bargaining agents. A state might require nonunionized employment relationships to provide certain employee rights, such as protection from arbitrary dismissal, not primarily or at least solely because of a collective (and for many paternalistic) determination that all employees in our society should have these rights. A state's requirement of minimum employee rights might instead, or at least in addition, rest on a determination that such rights would normally be freely negotiated by sophisticated employees not frustrated by individual employees' difficulty purchasing collective goods (such as arbitration systems), as well as by generally limited bargaining leverage.[261] Whether or not one agrees that these market-correction and redistributive purposes for particular minimum employee rights are persuasive,[262] it certainly is rational for a state to conclude that they do not extend to employees represented by experienced unions whose exclusive bargaining status may provide both adequate bargaining leverage and a solution to the free-rider dilemma that burdens an individual employee's negotiation of a collective benefit.[263]

259. *Cf. supra* notes 83-84 and accompanying text. *See also* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985) ("Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA."). Professor Herman therefore believes that this third state option should be preempted. *See* Herman, *supra* note 26, at 649 at n.263.

260. *See* Weiler, *Promises to Keep, Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (arguing that increased employer resistance to unionization in part explains decline in union density); R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 221-245 (Basic Books 1983) (summary and analysis of empirical support for this proposition).

261. *See generally* P. WEILER, THE LAW GOVERNING THE WORKPLACE (Harvard Univ. 1990); S. ESTREICHER & M. HARPER, THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP, 759-78 (West 1990); Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101, 125-34 (1988).

262. For an example of a dissenting view, *see* Freed & Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989).

263. A fourth option that a state legislature might choose to avoid duplicative litigation under its public law and that of a collective agreement, however, should be subject to preemption under the *Oliver-Machinists* precedent. New York's whistleblower protection law, for instance, provides that "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any . . . collective bargaining agreement . . . ." N.Y. LAB. LAW § 740(7). State law can control the remedial processes it creates, but not those created by a collective

For me as a hypothetical lawmaker, the above analysis would not be sufficient to justify an unequal treatment of union and nonunion employees. However, in contrast to what appears the predilection of many judges, I resist clothing my political preferences in preemption doctrine. At least since the Taft-Hartley amendments, the federal labor laws do not so clearly favor the establishment of collective representation as to preempt any state law that might influence employees to reject such representation. What these laws do clearly do, on the other hand, is to protect from state encroachment any collective bargaining that is chosen by employees. In this essay I have argued that this protection should be the linchpin of doctrine defining which state law provisions of minimum employee rights must be preempted, whether through section 301 presumptions or the *Oliver-Machinists* precedent I have attempted to invigorate.

agreement. Restricting access to the latter because of utilization of the former frustrates unions' negotiation of a particular benefit through collective bargaining almost as directly as did Ohio in the *Oliver* case. New York should thus be satisfied to provide that the initiation of a remedy available under a collective agreement constitutes a waiver of the rights and remedies provided by its whistleblower law.